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CHARLES ELMORE

In the Supreme Court of the United States

No. 762.
October Term, 1950.

(Now No. 75,
October Term, 1951.)

LOUISE MCGREW MOFFETT as an Individual and Executrix of the Estate of Thomas S. Moffett, Deceased, *Petitioner,*

vs.

COMMERCE TRUST COMPANY, a Corporation, HELEN WEEDE, ORLIN A. WEEDE, B. C. HOWARD, WILLIAM H. KOPP AND R. E. COPMAN, *Respondents.*

BRIEF OF RESPONDENT COMMERCE TRUST COMPANY IN OPPOSITION TO DOCUMENTS FILED BY PETITIONER, ENTITLED

(a) "Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit."

(b) "Petitioner's Brief in Support of Petition for Certiorari."

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It should be noted that all suits and claims filed by Commerce Trust Company in its respective representative capacities were based on the books of account (journals and ledgers) which had been kept for many years in the joint office of John Moffett and Thomas S. Moffett before the death of John Moffett, and kept thereafter by Thomas S. Moffett until the time of his death 9

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Point 2. Petitioner invoked jurisdiction of the Federal court solely on the ground that the alleged action arose under certain provisions of the Federal Constitution and laws of the United States. (See appellant's record, pages 2, 3.) The lower court had jurisdiction to hear and sustain the motion to dismiss the second amended complaint for failure to state a cause of action (claim) upon which relief can be granted. Jurisdiction is not defeated by the possibility that the averments might fail to state a cause of action upon which petitioners could actually recover 44

Point 6. The doctrine contended for by petitioner's counsel if sanctioned, and approved by the Court, would result in the destruction of time-honored precedents and be revolutionary in its effect, because, as applied to the facts in the instant case, it would permit a litigant—after the adverse decision of the trial court, after a judgment of affirmance by the court of last resort of the state, and after denial of a writ of certiorari by the Supreme Court of the United States; and after filing a suit to restrain the enforcement of said judgment in the Federal District Court, and after the adverse decision of that court and after the decision of the District Court had been affirmed by the United States Circuit Court of Appeals, and after the Supreme Court of the United States had

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In the Supreme Court of the United States

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LOUISE MCGREW MOFFETT as an Individual and Executrix of the Estate of Thomas S. Moffett, Deceased,
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BRIEF OF RESPONDENT COMMERCE TRUST COMPANY IN OPPOSITION TO DOCUMENTS FILED BY PETITIONER, ENTITLED

(a) "Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit."

(b) "Petitioner's Brief in Support of Petition for Certiorari."

EXPLANATORY.

References herein to pages in: (1) Printed Record of Appellant (Petitioner here); (2) Supplemental Record of Appellee (Respondent here) Commerce Trust Company; (3) Supplemental Record of Appellees (Respondents here) Helen Weede and Orlin A. Weede; and (4) Record containing "Proceedings in the United States Court of Appeals," will be, respectively, made (1) by placing the page number in parenthesis thus: (15); (2) by placing the page number in parenthesis thus: (C15); (3) by placing the page number in parenthesis thus: (W15); and (4) by placing the page number in parenthesis thus: (Pro. 15).

Petitioner's printed record is sometimes referred to thus: (R15).

Unless otherwise indicated by the context, the word "complaint" as herein used means the Petitioner's "Second Amended Complaint," which was later amended by interlineation.

In the instant brief the Petitioner will be sometimes referred to as Appellant, and Respondent(s) will be sometimes referred to as Appellee(s).

Herein the suit instituted in the District Court of Harper County, Kansas, will, for brevity, sometimes be designated as Cause No. 7374.

STATEMENT.

This brief (see subdivision thereof captioned "FOREWORD") contains references to pages of our record wherein there are set forth true copies, reproduced by photographic process, of seven opinions which are either *specifically mentioned or definitely referred to in the complaint,* accompanied by our comments identifying the nature of each of these cases. In four of these cases petitioner sought review in this Court. Said part of our brief captioned "FOREWORD" contains specific references to each of these seven cases, which references are of an identifying nature, and, as regards these four cases, shows the places in our record where appear full copies of the "Specifications of Errors," and in the case reviewed by appeal, appellant's statement and designation under "Paragraph 9, Rule 13" of this Court, as filed in this Court. For the sake of brevity we suggest that the Court at this point examine the statements of facts in the opinions in the following cases, which statements meet with our approval, to-wit:

1. *Moffett* v. *Moffett,* 136 Kan. 582, 292 Pac. 947: Pages 583-585: These recitals are predicated upon the Court's examination of the transcript of the record.

2. *Clark* v. *Moffett,* 136 Kan. 711; 18 P. (2d) 255: The statements appearing on pp. 712 to 714. These recitals were predicated upon the transcript of the record.

3. *Moffett* v. *Robbins,* 14 Fed. Supp. 602; pp. 603 to 604: These recitals were based upon the allegations in petitioner's "Third Amended and Supplemental Bill in Equity," together with an amendment thereto.

THIS BILL WAS FORMULATED ENTIRELY BY PETITIONER'S COUNSEL, AND SHOWS ON ITS FACE THE VARIOUS MOTIONS DIRECTED AGAINST FORMER BILLS FOR BETTER STATE-

MENT OF CLAIM, AND THE RELUCTANT EFFORTS OF PETITIONER TO FINALLY COMPLY WITH THE ORDER OF THE COURT, SUSTAINING SUCH MOTIONS.

4. *Moffett* v. *Robbins*, 81 Fed. 431; pp. 433 to incomplete paragraph on p. 435. Therein Judge Bratton carefully analyzes all of the bill of petitioner and painstakingly analyzed and stated the contentions thereby asserted by her.

For the sake of brevity, and in order to avoid duplication, we adopt as part of our STATEMENT the Statement of Respondents Weede made at the beginning of their opposition brief.

John Moffett died August 27, 1927, and shortly thereafter his brother Thomas qualified as executor of his estate. On February 7, 1928, he filed in the Probate Court a verified inventory and appraisement of the estate of John Moffett (C506-513), on pp. (C509-511) of which there appear references to the status of his personal connection with the various partnerships and the inter-obligations between himself and these partnerships, and between the partnerships themselves. He continued to act as such executor until the appointment of his successor on November 28, 1928, having been removed by an order entered November 7, 1928. In the order appointing his successor (C411) it was ordered that he make his final settlement with his successor on or before December 15, 1928. What transpired during the period between the date of his appointment and August 17, 1928, the date of the filing of the application by Respondent Helen Moffett (now Weede) can best be learned from examination of her petition for removal, appearing in (R398-416). It appears therefrom that this motion contained recitals concerning his obligations to the various partnership estates and the obligations of the various partner-

ship (of which he was a member) to other partnerships. One of the complaints made in the said motion was that during his almost eight months of service as executor he had failed both as executor and as surviving partner to institute actions which should have been promptly brought to protect against the running of the statutes of limitations. This motion contains many allegations which show the differences which had arisen between Mr. Moffett as executor and the widow and heirs and devisees of John Moffett, as to his conduct in not protecting their interests, and otherwise.

Thomas Moffett later filed his Final Settlement as executor. Exceptions were filed thereto and the Court, after a hearing, modified and approved same on February 7, 1929 (C516-521), and directed him as executor to turn over and deliver to his successor the various items of property therein described (C517) and to deed to Commerce Trust Company as such successor, the Hymer Ranch located in Morris and Chase Counties in the State of Kansas, which had been acquired by him during the period of administration, with funds belonging to the estate of John Moffett.

During the interval between February 7, 1929, and the trial of Cause 7374, petitioner on February 5, 1931, filed in the Circuit Court of Jackson County, Missouri, a suit numbered 341-312, a full copy of the petition in which suit appears (C521-534), wherein she sought to restrain the defendants from prosecuting the various claims then pending, except in said cause and in the Circuit Court of Jackson County, Missouri. The names of the parties appear on (C521-522). On March 16, 1931, she filed in the last-named cause her first amended petition seeking the same relief; a full copy thereof appears on (C534-552). In 1932, she filed a Supplemental and Amended Petition in the same cause praying for the same

relief. The parties named in this petition are the same as those named in the prior petitions, except that Grace Torrance Clark was omitted as a party plaintiff by reason of orders made by the court. This cause remained pending until *July 13, 1948* (W861) at which time it was voluntarily dismissed without prejudice by petitioner.

On August 15, 1929, Thomas S. Moffett instituted Cause 7374 for partition of the Moffett Brothers partnership real estate in Kansas, and for an accounting. (On July 9, 1929, he instituted in the Clay County, Missouri, Circuit Court a suit to partition lands in that county belonging to the partnership estate of Moffett Brothers. Reference to that proceeding will be made in another part of our brief.) On July 14, 1929, the Harper County Court overruled petitioner's demurrer to the answer of defendant Helen Moffett (now Weede), and sustained Commerce Trust Company's application for leave to intervene. An appeal was taken from these orders, and the lower court was affirmed by the opinion in 131 Kan. 582, handed down on November 8, 1930, which has been and will be frequently referred to in the various briefs. Thomas S. Moffett died in December, 1930, and Cause 7374 was revived against the petitioner and Grace Torrance Clark, his administrator. Following the order of reviver Mrs. Moffett and Mrs. Clark filed application for removal of Cause 7374 to the Kansas District Federal Court, in which there were filed Motion to Remand and Plea to the Jurisdiction. On April 20, 1931 (W262), Judge John C. Pollock, judge of that court, denied this motion and this plea. During the interval all of the parties to 7374, including Commerce Trust Company, as Intervener, entered into a Stipulation for an accounting, a full copy of which is set out in the Statement of Respondents Weede. R. O. Robbins, administrator of the

estate of John Moffett in Kansas, intervened on June 15, 1931. For his intervening petition see (C754-760). The trial of the Harper County suit commenced in the early part of October, 1931, and consumed many days. The court made Finding of Facts and Conclusions of Law January 12, 1932, and rendered judgment on January 13, 1932. (The Journal Entry of Judgment, which is provided for and required by the rules governing district courts promulgated by the Supreme Court of Kansas, was entered on March 5, 1932.) An appeal was taken to the Supreme Court of Kansas, which, on January 28, 1933, affirmed the lower court (C27). During the interval between 1933 and 1940, many additional proceedings were had. There was first the effort to procure this Court to review Cause 7374 by certiorari, and later, petitioner sought to restrain the enforcement of the judgments in Cause 7374 by proceedings instituted in the Kansas District Federal Court. When that court dismissed her complaint for failure to state a cause of action (as he stated), the petitioner appealed from that judgment to the Court of Appeals for the 10th Circuit, which sustained the lower court. Thereupon she sought certiorari in this Court, which was denied. (All of the foregoing facts appear definitely in other parts of our brief.) On August 22, 1941, she in her individual capacity brought suit against all of the present defendants except defendant Kopp and Copman. In the present complaint she alleges that this suit was brought for the same damages and on account of the same overt acts which are mentioned in the complaint in the instant case (R29). Later she filed an amended complaint in which she added herself in her representative capacity as a party plaintiff and named defendants Kopp and Copman as additional parties defendant. Successive amended petitions were filed and demurrers thereto were sustained by the follow-

ing judges who passed on different separate amended petitions, to-wit: Judge Ben Terte, Judge Emory Wright and Judge Albert A. Ridge (who passed on the Fifth Amended petition), now judge of the United States District Court for the Western District of Missouri.

Following the orders of Judge Ridge made in December, 1944 (following his sustaining of the demurrer), an appeal was taken to the Supreme Court of Missouri, in which the lower court was affirmed. *Moffett* v. *Commerce Trust Company,* 354 Mo. 1098, 193 S. W. (2d) 588; opinion filed February 11, 1946. Rehearing denied April 8, 1946 (C. 48). It is interesting to note the contentions made by petitioner in that case, because they are identical with nearly all of the contentions now asserted by petitioner before your Court. They appear in this opinion on pp. 1099-1105, and also in (C49-55).

An appeal was taken from the last-named decision to this Court. For copy of her petition filed in the Supreme Court see our record pages (C436-443). This Court dismissed the appeal on October 14, 1946 (R70) and rendered a *per curiam* opinion in which the following cases were cited: *Enterprise Irrigation District* v. *Canal Co.,* 243 U. S. 157, 165; *Utley* v. *St. Petersburg,* 292 U. S. 106, 111. We regard the citing of these opinions as significant.

In the Utley case, l. c. 112, the Court said:

> "The federal questions are unsubstantial; the nonfederal question is genuine and adequate."

In the Enterprise case there are recitals which we think very significant. The following, however, is a very pertinent one:

> "The due process clause does not take up the laws of the several states and make all questions pertaining to them constitutional questions, nor does it enable this court to revise the decisions of the state courts upon questions of state law."

The petitioner filed a lengthy motion for a rehearing, full copy of which appears (C448-505). This motion was denied on November 12, 1946 (C506). The instant suit was brought in the District Court on February 7, 1947, and remained in that court until it was finally dismissed with prejudice on December 1, 1949. A previous order to dismiss was sustained on December 11, 1947.

On October 15-16, 1947, oral hearings were had in the District Court, the transcript of which covered 164 pages (C937). There were many other oral hearings before the court. We contend that Commerce Trust Company, in its respective representative capacities, was not an agent or functionary of the State, and confidently assert that our contention is supported by our brief on that question hereinafter appearing. We further contend that under no circumstances do the allegations in the complaint show any facts which would make it liable to the petitioner for alleged violation of her rights under the Civil Rights Acts and the XIVth Amendment either as alleged co-conspirator or otherwise. In short, we contend that, stripped to its essence, petitioner's allegations are that the present defendants conspired with certain judges who were state officers, and that there are no recitals in the complaint which would make these judges liable if they were parties to the suit, the sole contention made against them being, at the most, that they rendered erroneous decisions.

Petitioner refers to transactions concerning "Oklahoma lands." For information as to what happened concerning them we refer the Court to pages (C721 to 735, both inclusive).

Petitioner also refers to "Hymer Ranch." For information as to what happened concerning it we refer the Court to our record (C689 to C709) for proceedings in the Probate Court of Jackson County, Missouri, concern-

ing its sale and as regards proceedings in the Probate Court of Morris County, Kansas, concerning this sale, we refer to pages (C710 to C720).

The judgment for $143,829.06 rendered in the District Court of Harper County, Kansas, in Cause 7374 was rendered in favor of R. O. Robbins, administrator, with the will annexed of the estate of John Moffett (R33), and the enforcement thereof was conducted by him. The court appointed sheriffs of the respective counties in which the lands were located as agents of the court to make the sale. These sales were all reported to the court and approved and confirmed by the court, after due notice to all of the parties. For information concerning the confirmation of these sales, see (C862-873). No appeals were taken from these orders of confirmation, which were rendered on divers dates, the first on April 21, 1934, and the last on January 26, 1935.

It should be noted that all suits and claims filed by Commerce Trust Company in its respective representative capacities were based on the books of account (journals and ledgers) which had been kept for many years in the joint office of John Moffett and Thomas S. Moffett before the death of John Moffett, and kept thereafter by Thomas S. Moffett until the time of his death.

Petitioner assails the validity of the appointment of Commerce Trust Company because of her allegation that same was drafted by Respondent B. C. Howard while in its employ. This will was executed on February 21, 1921, at which time there was in full force and effect a Missouri Statute, R. S., 1919, Sec. 11804, the full text of which appears as Item 3 in our Appendix. (This Statute was enacted in 1915 and has appeared without change since that time, and is now R. S. Mo., 1945, 363.230.) The will of John Moffett appears in full in petitioner's

record in (R109-110), and contains the following declaration made therein by testator:

> "• • • and I hereby certify that before the execution of this my last will and testament, I had advice and counsel in relation thereto from someone not under salary from Commerce Trust Company, who may become executor hereunder."

Notwithstanding this recital and this statute, neither the petitioner nor any other person has every attempted to procure the removal of Commerce Trust Company in any capacity or on any ground. It was appointed as executor *de bonis non* on November 28, 1928, and as administrator of the partnership estate of Moffett Brothers on December 28, 1928, and as administrator of the partnership firm of Moffett Brothers and Andrews on the same date, and has continued in those capacities down to the present hour. After the appeal from the lower court was lodged in the Court of Appeals for the 8th Circuit (R736) (R753), petitioner sought to enjoin the prosecution of Cause 339-134 then pending before a referee in the Circuit Court of Jackson County, Missouri, in which Commerce Trust Company, in its capacity as administrator of the partnership estate of Moffett Brothers and Andrews, was plaintiff, and an oral hearing was had on her application. On March 8, 1950 (R763), the Court of Appeals denied them in all respects. Thereafter petitioner filed a petition for rehearing (R764). This petition was denied on March 25, 1950 (R767).

Petitioner does not charge and cannot truthfully charge that Commerce Trust Company in its respective personal or individual capacities was in anywise *pecuniarily* interested in any of the estates which have been administered by it throughout the years. In a brief filed in the lower court she did contend that Commerce Trust Company had a motive on account of the statutory fees that

might inure to it. As regards the main judgment for $143,829.06, it is evident that the statutory compensation which inured on that account would inure to R. O. Robbins, administrator, in whose favor same was rendered and who conducted the proceedings to enforce this judgment.

Despite the many epithets hurled at respondent Commerce Trust Company we most respectfully say that throughout this prolonged litigation it has conscientiously attempted to perform the duties devolving upon it and this under very trying circumstances because of the dissensions and difference between the parties *actually* and *pecuniarily* interested in these estates.

OPINIONS BELOW.

The opinions of the District Court are in 75 F. Supp. 303 and 87 F. Supp. 438; and the opinion of the Court of Appeals is in 187 Fed. 2d 242. They also appear in the record, respectively, at (669-775; 775-784) and (Pro. 1-13).

RESPONSE OF RESPONDENT COMMERCE TRUST COMPANY TO PETITIONER'S STATEMENT ON "JURISDICTION" APPEARING ON PAGES 2 AND 3 OF HER PETITION.

The lower court did not have jurisdiction on the ground of diversity of citizenship. See Point I in later part of this brief entitled, "Statement of Additional Points," etc.

Petitioner did not seek to have the instant case reviewed by appeal but sought to have same reviewed by the Writ of Certiorari. As indicated by her prayer appearing on pages (27-28), she prayed for an order directed to the United States Court of Appeals for the 8th Cir-

cuit to certify and send to this Court a full and complete transcript of the record, etc.

Sec. 5 of Rule 38 of this Court provides that a review on Writ of Certiorari is not a matter of right, but of sound discretion. This Court in the exercise of its sound discretion has the right to determine whether or not the application for the Writ will be granted or denied, and this in accordance with the procedure which has prevailed and obtained in the Supreme Court of the United States for several generations, and this in the manner stated in the very recent opinion of this Court in the case of *Maryland* v. *Baltimore Radio Show,* 338 U. S. 912, 94 L. Ed. 562 (decided on January 9, 1950), which case follows an unbroken line of decisions covering a space of many years.

Petitioner seeks to review the construction made by the Court of Appeals of certain provisions of the Civil Rights Act; also to review the alleged failure of the Court of Appeals "to give full faith and credit and *res judicata* effect to the decision of the Supreme Court of Missouri *In re Moffett Brothers Partnership Estate,* 345 Mo. 741-751," contending that this decision established that the "Judgment entries and orders" of the District Court of Harper County, Kansas, were void.

Petitioner further contends that "the complaint (R. 2-33) with Exhibits (R. 33-71) does state a valid claim for relief within the jurisdiction of the Federal Courts under the Civil Rights Acts, and that this contention was decided adversely to the petitioner in the United States Court of Appeals." We seriously challenge the contention that the opinion or decision in the 345 Mo. 741 case had any *res judicata* effect on the judgments and orders of the Harper County District Court, or that any of the same were void, and that these contentions are without merit, and that our contrary contention is abundantly sustained by the alle-

gations in petitioner's complaint and in exhibits attached thereto and by said complaint made a part thereof.

We further contend that it appears from the allegations of said complaints and the exhibits thereto attached that plaintiff's complaint fails to state a claim or cause of action and that the lower court did not commit error in so deciding, and that the Court of Appeals did not commit error in affirming the opinion of the lower court.

We further contend that there is nothing in the complaint or in the exhibits thereto attached which shows that petitioner was deprived of any right redressable under the provisions of the Civil Rights Acts, and that the Court of Appeals did not err in its construction of the provisions of the Civil Rights Acts enumerated in said statement on jurisdiction.

RESPONSE OF RESPONDENT COMMERCE TRUST COMPANY TO PETITIONER'S STATEMENT ON PAGES 4 TO 13, BOTH INCLUSIVE, OF HER PETITION.

We do not agree with petitioner's initial recital that her complaint is clear. We contend that it is "vague," "indefinite," "uncertain," "involved," "confusing," "equivocal," "ambiguous," and in many places misleading. We contend that her Statement is not clear and that it is afflicted with the same vices.

It was our initial purpose to take up the items of this Statement one by one and fully refer to and discuss them. After we had devoted many hours to this effort and received a galley proof of part of our copy we found that to do so would result in expanding our brief beyond any proper bounds. In consequence we are setting forth only a few of the initial statements in an effort to furnish examples in support of our contentions. Had we pro-

ceeded, the same situation would have been apparent in many other parts of this Statement.

> (Page 4) "In accomplishing said purpose respondents requested said 'special' judge to remove Thomas S. Moffett as executor of the John Moffett estate * * *,"

The alleged request for the removal of Thomas S. Moffett was not made by any respondent other than respondent Helen Moffett. Petitioner's record on pages 398 to 416 shows duly authenticated and certified copies of (1) the notice dated August 17, 1928, calling up for hearing the Application for Revocation of Letters, and (2) the Application for Revocation of Letters filed August 20, 1928, signed and verified by Helen Moffett now Weede.

> (Page 4) That said request was made "* * * on the ground that the interests in said estate and the partnership estate which he was administering were in conflict."

This application consists of 13 pages plus exhibits covering 4 pages, and in the initial paragraph thereof Helen Moffett designated herself as the widow of John Moffett, deceased, and prayed the court to remove Thomas S. Moffett as executor, and therein stated many reasons why same should be done.

It is true that among the many grounds alleged in support of her application, the applicant stated facts showing that the personal or individual interest of Thomas S. Moffett conflicted with his duties in his capacities as (1) executor of the will of John Moffett, (2) as surviving partner of the partnership estate of Moffett Brothers (of which he was a member), and (3) as one of the surviving partners of the partnership estate of Moffett Brothers &

Andrews (a partnership estate whose members were John Moffett, Thomas S. Moffett and L. B. Andrews).

> (Page 4) "Thereupon, on the application of Commerce Trust Company, the same special probate judge * * * appointed Commerce Trust Company to act in the same identical conflicting capacities, * * *"

The order of the court sustaining the application for the removal of Thomas S. Moffett was made on November 7, 1928. The order appointing Commerce Trust Company executor *de bonis non* was made on November 28, 1928 (C407-410). This order is entered exactly in the form approved by the probate judge and also by "H. M. Beardsley, attorney for Thomas S. Moffett, executor, and A. E. Watson, attorney for Thomas S. Moffett"; a photostatic copy of the same, on which said signatures appear, is set forth on page 411 of the printed record of Commerce Trust Company.

> (Pages 4-5) "Thereupon Commerce Trust Company, notwithstanding there were sufficient assets in Missouri to satisfy a groundless claim made by it (R. 24) * * * was permitted by said state district judge, in direct violation of the laws of the State of Kansas, to intervene in said conflicting capacities * * *."

This statement is not correct. The proceedings in cause 7374 were not instituted until *August 15, 1929*. On *August 9, 1929* (W347), Thomas S. Moffett filed in the Circuit Court of Clay County, Missouri, a petition for the partition of the Clay County lands belonging to Moffett Brothers Partnership and for an accounting, naming as parties defendants Commerce Trust Company in its two capacities and the widow and heirs of John Moffett. In Paragraph 5 thereof (W347) it was alleged that the Commerce Trust Company was the duly acting executor *de bonis non* of the will and estate of John Moffett and the

duly appointed and acting administrator of Moffett Brothers Partnership in Missouri. It recited (W348):

> "• • • That dissensions and controversies have arisen • • • as to the correct status, rights and liabilities of the respective partners therein, which can only be determined by a court of equity upon an accounting had, and the respective rights of the parties adjudicated and determined."

This petition (W349) concluded with a prayer praying for an accounting.

On June 9, 1930 (C661-664), said Moffett filed an amended petition against the same defendants but omitting Commerce Trust Company in its two capacities as parties defendant.

On June 9, 1930, Commerce Trust Company filed applications to intervene in cause 7374 and was permitted to intervene by an order entered in said cause on July 14, 1930. Thomas S. Moffett appealed from this order in the Supreme Court of Kansas, and (131 Kan. 582) that court on November 8, 1930, affirmed the lower court. The trial of cause 7374 was not begun until October, 1931, and as regards Commerce Trust Company was tried on its Amended and Supplemental Intervening Petitions in its capacity as executor *de bonis non* of the will and estate of John Moffett, and as administrator of the partnership estate of Moffett Brothers, respectively, which intervening petitions were filed on June 15, 1931, and, respectively, appear on pages (C917-922) and (C922-929).

The prayer of Commerce Trust Company as executor in the first intervening petition is set forth on pages (C921-922). The prayer of Commerce Trust Company as administrator of the partnership estate of Moffett Brothers is set forth on pages (C927-928). The reading thereof will disclose that Commerce Trust Company did not prosecute a claim in behalf of the John Moffett es-

tate. It is important in this connection to mention the "Separate Supplemental Amended Answer of Helen Moffett, defendant" filed in in said cause 7374 on February 19, 1931 (W1019), the full copy of which appears on (W1019-1037).

> (Page 4-5) "Thereupon Commerce Trust Company * * * knowing that petitioner's testator had retained a local counsel who was unpopular with the state district judge (R. 161-162) * * *."

A careful search of the complaint shows no allegation therein concerning this unwarranted allegation. Petitioner's reference (R. 161-162) relates to her affidavit verified on September 12, 1949, and we assume that this recital is intended to direct attention to the following part of this affidavit:

> "Affiant further states that Mr. E. C. Wilcox was retained during Thomas S. Moffett's lifetime, and we never knew of the matters and things stated in the opinions of the Supreme Court of Kansas reported in *State* v. *Wilcox,* 90 Kan. 80, *Ex parte Wilcox,* 90 Kan. 95, *Horner* v. *Shinstock,* 77 Kan. 663, *Horner* v. *Shinstock,* 80 Kan. 136, until after the affirmance by the Supreme Court of Kansas of the original decisions by the District Court of Harper County, Kansas. Affiant observed that during the proceedings in said court Judge Hay treated Mr. Wilcox with the utmost discourtesy and lack of consideration."

The opinions in *State ex rel. Wilcox,* 90 Kan. 80, and *In re the Disbarment of E. C. Wilcox,* 90 Kan. 95, were handed down on the same day, June 7, 1913. The opinion in the first mentioned case is an opinion rendered on appeal from an action in which Wilcox and others were charged with criminal libel on the grounds that they had vilified and defamed P. B. Gillett, who was a Kansas District Judge. Wilcox was acquitted and the other de-

fendants who were found guilty appealed. The opinion in 90 Kan. 95 was an original proceeding in the Kansas Supreme Court to disbar E. C. Wilcox and the court directed the entry of a judgment of disbarment.

We cannot see the slightest relevancy of these two cases to any issues in this case. In passing we might say that the recitals which appear in these two opinions are most interesting and disclose a sordid state of affairs where parties seek to influence judicial action by attempting to defame and libel a judge. Affidavits were circulated charging him with misconduct with a girl of less than eighteen years of age.

We respectfully submit there is nothing in the affidavit of Mrs. Moffett which justifies the ugly and false insinuations that Commerce Trust Company had intervened in the Kansas litigation because of the unpopularity of Mr. Wilcox with the district judge, or that it even had any knowledge of such unpopularity, if same in fact existed. Thomas S. Moffett, as plaintiff, selected the forum in which to bring his partition accounting suit but it was necessary that same be instituted in the District Court of a county in which the real estate sought to be partitioned was located.

The record does not disclose when Wilcox was again permitted to practice law nor when he was first employed in cause 7374. The petition (373-78) in that case filed on August 15, 1929, shows that at the time of its filing he was represented solely by Mr. A. E. Watson, who was a veteran Kansas lawyer and was Mr. Moffett's attorney during his lifetime and likewise was the attorney for the petitioner from the time of the death of her husband up to the time of Mr. Watson's death in 1949.

Frankly, we cannot see anything in *Horner* v. *Shinstock*, 77 Kan. 663, or in *Horner* v. *Shinstock*, 80 Kan. 136, which

has the slightest relevancy to the recitals appearing in Mrs. Moffett's affidavit.

The record further shows that Wilcox lived in the town of Anthony which was the county seat of Harper County, where a substantial part of the partnership real estate was located.

> (Page 5) "Commerce Trust Company * * * was permitted by said state district judge * * * to intervene * * * and to prosecute said unfounded claim as executor of the John Moffett estate against itself as Missouri administrator of Moffett Brothers partnership estate and on March 5, 1932, to make a void judgment entry of $143,828.96 against itself in said capacity in favor of said John Moffett estate."
>
> (Pages 4 and 5) "Commerce Trust Company * * * was permitted by said state district judge * * * to intervene * * * and to prosecute said unfounded claim as executor of the John Moffett estate against itself as Missouri administrator of Moffett Brothers Partnership estate and on March 5, 1932, to make a void judgment entry for $143,829.96 against itself in said capacity in favor of said John Moffett estate."

The foregoing recitals are vague, indefinite and confusing and do not accurately state the facts.

The judgment in this case was rendered in favor of "intervenor" R. O. Robbins, administrator with the will annexed of the estate of John Moffett. Petitioner's statement is calculated to create the impression that this judgment was in favor of Commerce Trust Company. Her complaint itself clearly shows this because in her Exhibit "A" attached to the complaint there appears *in haec verba* a copy of a short, expurgated recital (entirely stripped from its contents), taken from the Journal Entry of Judgment which consists of many pages, showing that Mr. Robbins in his capacity of administrator of the John Moffett estate recovered this judgment.

Frankly, we cannot see any justification for this clearly appearing situation being presented to this Court in such ambiguous and misleading language.

Petitioner makes this allegation in face of the fact that the proceedings culminating in the opinion in *Moffett* v. *Robbins* (14 Fed. Supp. 602), and *Moffett* v. *Robbins* (81 Fed. Supp. 2d 431), show that therein she sued R. O. Robbins as such administrator to restrain the enforcement of the identical judgment above referred to.

R. O. Robbins was appointed ancillary administrator of the estate of John Moffett, deceased, in Kansas shortly after the death of John Moffett in 1927, over three years prior to the death of Tom Moffett.

The intervening petition of R. O. Robbins as administrator with the will annexed of John Moffett, deceased, was filed in cause 7374 on June 15, 1931, and appears in full in (C754-760) and the prayer thereof appears on (C760).

Response of respondent Commerce Trust Company to petitioner's Statement appearing on pages 1-11 of her brief.

What we have said in our references to the Statement appearing in her petition apply with equal force to some of the statements in her brief, and for the reasons stated in the preceding section we have not attempted to point out the vague, erroneous, incorrect and misleading statements there, a few of which are repetitions of the recitals appearing in the Statement.

We desire to bring to the attention of this Court recitals appearing at the bottom of page 19 of petitioner's brief. The quoted paragraph is not preceded or followed by asterisks. It is wrested and stripped from a lengthy paragraph appearing in our record on pages 120 to 122. The signatures appearing at the end of page 19 are quoted from what appears on page (C129) which is 8 pages removed from the quoted excerpt.

FOREWORD.

There appear in appellee (respondent here) Commerce Trust Company's Supplemental Record, as its Exhibits numbered 1, 2, 3, 4, 5, 16 and 17, copies made by photostatic process of the opinions, including syllabi, rendered in the cases hereinafter mentioned. The official volumes in which these cases are contained, the numbers of these cases respectively, the style of these cases respectively, and the syllabi of these cases respectively, the pages of the official reports in which these cases appear, and the pages of the reports appearing in the West Reporter system, and the pages on which same appear in our Record are respectively as follows:

Exhibit Number	Number and Style of Case	Pages of Our Record
1	No. 29,807—Thomas S. Moffett, Appellant, v. Helen Moffett, the Commerce Trust Company, Executor *de bonis non* of the Will and Estate of John Moffett, Deceased, and the Commerce Trust Company, Administrator of the Partnership Estate of Moffett Brothers, et al., Appellees. —131 Kan. 582, 282 Pac. 947..... (This is the opinion on the first appeal from the Harper County, Kansas, District Court in cause No. 7374.)	19-25
2	No. 30,826—Grace Torrance Clark, Administratrix with the Will Annexed of the Estate of Thomas S. Moffett, Deceased, and Louise McGrew Moffett, Appellants, v. Helen Moffett, et al. (The Commerce Trust Company, Executor *de bonis non* of the Estate of John Moffett, De-	

ceased, the Commerce Trust Company, Administrator of the Estate of Moffett Brothers, and R. O. Robbins, Administrator with the Will Annexed of John Moffett, Deceased, Interveners), Appellees.—136 Kan. 711, 18 Pac. 2d 555..... 26-39

(This is the opinion on the second appeal from the Harper County, Kansas, District Court in cause No. 7374. Petition for Certiorari was docketed in this Court as case "No. 181, October Term, 1933." Cert. denied October 9, 1933 (290 U. S. 642). December 11, 1933, motion for leave to file petition for rehearing denied (290 U. S. 602). For Specification of Errors see (C427-430, inclusive).)

3 No. 1307—Moffett, et al., v. Robbins.—81 F. 2d 431..... 40-46

(This is the opinion rendered by the United States Court of Appeals for the Tenth Circuit, on appeal from the decision of the United States District Court of Kansas mentioned in the next succeeding item. Certiorari docketed as case "No. 918, October Term, 1935." Cert. denied May 18, 1936 (298 U. S. 6[illegible]). For Specification of Errors see pages (C432-434 incl.).)

4 No. 436—Moffett, et al., v. Robbins.—14 F. Supp. 602..... 46a-46d

(This is the opinion of the United States District Court of Kansas dismissing petitioner's complaint to restrain and enjoin the enforcement of the judgments rendered in the District Court of Harper County, Kansas, in cause No. 7374. See next preceding item for opinion on appeal.)

5 No. 39509—Louise McGrew Moffett and Louise McGrew Moffett as Executrix of the Estate of Thomas S. Moffett, Deceased, Appellants, v. Commerce Thust Company, a Corporation, Helen Weede, B. C. Howard, and William H. Kopp.—354 Mo. 1098, 193 S. W. 2d 588..... 48-80
(This exhibit contains the court reporter's Statement of Points and Authorities consisting of many pages, as published in the official report. Petitioner appealed from decision in this case. Appeal was docketed as case "No. 318, October Term, 1945." She filed in this court Assignment of Errors theretofore filed on June 21, 1946, in Missouri Supreme Court; for same see (C436-442, both incl.). On August 1, 1946, she filed "Appellant's Statement and Designation under Paragraph 9, Rule 13." Same appears on page (C443-448, incl.). October 14, 1946, this court granted motion of respondents to dismiss appeal and rendered its *per curiam* opinion reported in 329 U. S. 669. Same is also set forth in Exhibit "I" to petitioner's complaint. Thereafter petitioner filed a Motion for Rehearing consisting in all of 64 printed pages. Said motion appears on pages (C448-505). Motion for rehearing was denied on November 12, 1946 (C506).)

16 No. 30567—Clark v. Andrews, et al.—136 Kan. 23, 13 Pac. 2d 294..... 251-259
(On January 5, 1931 (C253), Grace Torrance Clark was appointted administratrix of the Estate of Thomas S. Moffett in Kansas; and on January 8,

1931, she secured an order of the Probate Court of Wyandotte County, Kansas, directing her to take into her possession all of the partnership assets of the following dissolved partnerships: Moffett Bros., Moffett Bros. & Andrews, and Andrews, Lewis & Moffett. L. B. Andrews, a member of two of these partnerships, filed a motion to modify the last order; and the Probate Court made an order modifying the January 8 order, the effect of which was to withdraw from Mrs. Clark the right to administer the partnership estates of Moffett Bros. & Andrews, and Andrews, Lewis & Moffett. Mrs. Clark appealed to the District Court of Wyandotte County, which reversed the order of the Probate Court. Andrews appealed to the Supreme Court of Kansas, which, in the opinion above referred to as Exhibit 16, rendered on July 9, 1932, reversed the decision of the District Court and directed that: "The judgment of the district court is reversed, with directions to sustain the order of the probate from which the appeal to the district court was taken." *Commerce Trust Company was not in any capacity a party to this litigation.*)

17 No. 29495—Moffett v. Moffett, et al.—131 Kan. 546, 292 Pac. 942..... 263-273
(This opinion was rendered on November 8, 1930, on appeal from a decision of the District Court of Comanche County, Kansas, of which Karl Miller was Judge, which decision involved the litigation which in the instant case is commonly referred to as the "Co-

manche County litigation" or by like designation. The decision of the District Court was in favor of Helen Moffett, now Respondent Helen Weede. The Supreme Court of Kansas affirmed "the entire judgment" of the lower court (C273). The Comanche County litigation is frequently referred to in the complaint and will be referred to in our brief in the instant case. *Commerce Trust Company was not in any capacity a party to this litigation.* Certiorari docketed in Supreme Court as case "No. 700." The Specification of Errors appears in (W318-319) and on pages (W317-318) appear the jurisdictional statement and authorities cited to sustain jurisdiction. This court denied certiorari on March 9, 1931. (283 U. S. 825; 75 L. Ed. 1440).)

All of the opinions mentioned above were either specifically cited or definitely referred to in appellant's second amended complaint as more fully appears in our Statement which immediately follows.

Exhibits 1 to 5, both inclusive, are by appellee Commerce Trust Company (respondent here), expressly made a part of Part III (C9) of its "Amendments" filed April 2, 1948 (being respondent Commerce Trust Company's motion to dismiss for failure to state a claim) (C7 and following), and are respectively referred to and described therein (C13).

We have prepared the foregoing tabulation, hoping that it may be of some aid and assistance to the members of this Court in having before them in compact and readily available form the full text of the foregoing opinions.

REFERENCES TO PROCEEDINGS IN OTHER RELATED CASES IN FEDERAL AND STATE COURTS:

A. Unpublished opinion of Hon. John C. Pollock, judge of the United States Court for the District of Kansas.

B. Suits filed in the Supreme Court of Missouri on April 2, 1930, numbered respectively: No. 30533, No. 30534 and No. 30535.

C. *Zombro* v. *Moffett et al.* (Mo.), 44 S. W. 2d 149.

A.

On pages 262-266 of Supplemental Record of Appellees (now respondents) Weede, there appears the unpublished opinion (styled "Memorandum of Decision on Motion to Remand and on Plea to the Jurisdiction of the Court") of Hon. John C. Pollock, Judge of the United States District Court for the State of Kansas, rendered on April 20, 1931 (filed with the court clerk on April 21, 1931), on Motion to Remand and Plea of Jurisdiction in a proceeding to remove Cause No. 7374 to the United States District Court for Kansas. Commerce Trust Company in each of its capacities was named in the caption of this opinion.

Judge Pollock's Memorandum Decision includes the following sentence: "It follows, the Motion to Remand and the Plea to the Jurisdiction must be and are sustained." The petition for removal of Cause 7374 to the Federal District Court was referred to on the bottom of page 721 and the top of page 722 in *Clark* v. *Moffett*, 136 Kan. 711.

B.

On pages 379-384, both inclusive, of the Supplemental Record of Appellee (now Respondent) Commerce Trust Company, and on pages 386 to 388, both inclusive, thereof,

and on pages 390 to 394, both inclusive, thereof, there appear certified copies of the Applications of Thomas S. Moffett, the petitioner therein, for Writs of Certiorari in Causes filed in the Supreme Court of Missouri on April 2, 1930, numbered in said court respectively as No. 30533, No. 30534 and No. 30535. On pages (C385) (C389) and (C394), respectively, there appear certified copies of orders made in the Supreme Court of Missouri on the 15th day of May, 1930, showing that the respective petitions for certiorari in the three causes, No. 30533, No. 30534 and No. 30535, were denied. Each of these appplications or petitions for certiorari was directed against "Jules E. Guinotte as Judge of the Probate Court of Jackson County, Missouri, at Kansas City, Respondent." These applications were verified by said Thomas S. Moffett, and therein he expressly stated that Commerce Trust Company was on the 28th day of November, 1928, appointed Executor *de bonis non* of the estate of John Moffett, deceased, and that thereafter, on the 28th day of December, 1928, Commerce Trust Company made application and executed a bond as required by law, and was appointed Administrator of the partnership estate of Moffett Brothers (and of the partnership estate of Moffett Brothers & Andrews) "and ever since said time has been and is now administering upon said estate."

C.

***Zombro* v. *Moffett et al.* (Sup. Ct. Mo.), 44 S. W. 2d 149 (not reported in the official reports).**

The Zombro case is referred to by the Supreme Court of Kansas in its opinion in the case of *Clark* v. *Moffett*, 136 Kan., l. c. 713, as follows:

> "When the action went back to the trial court, broadly speaking, the only controversy between the parties was with respect to the accounting. The will

> **of John Moffett had been construed as it affected some of the beneficiaries, both by this court (*Moffett* v. *Moffett*, 131 Kan. 546, 292 Pac. 942) and by the Supreme Court of Missouri (*Zombro* v. *Moffett*, (Mo.), 44 S. W. 2d 149).''**

The Zombro case involved the construction of the will of John Moffett and the parties in the suit were Ethel Zombro, his niece, as Plaintiff and the following parties as Defendants: Thomas S. Moffett, executor, Thomas S. Moffett, brother of testator, and Louise McGrew Moffett, his wife, R. J. Moffett, brother of testator, and Bessie Moffett, his wife, J. W. Moffett, unmarried brother of testator, Jennie Lynn, sister of testator, and John C. Lynn, her husband, Annie M. McKee, sister of the testator, and B. S. McKee, her husband, and Helen Moffett, widow of testator. The Zombro case is referred to in the complaint.

In the opinion in *Zombro* v. *Moffett*, 44 S. W. 2d 149, there appears on page 150 a full copy of the will of John Moffett, paragraph 5 of which reads as follows:

> "5. I hereby nominate and appoint my brother, T. S. Moffett, executor of this, my last will and testament, and request that he be permitted to act as such without giving bond and in case of the death of said T. S. Moffett or his inability or refusal to act, then I nominate and appoint Commerce Trust Company, a corporation of Kansas City, Missouri, executor of this, my last will and testament, *and I hereby certify that before the execution of this, my last will and testament, I had advice and counsel in relation thereto from someone not under salary from Commerce Trust Company, who may become executor hereunder.*'' (Italics ours.)

A full copy of this will also appear in petitioner's printed record (109-10).

The Petitioner has not been denied due process. She has not only had her day in court but her months and years.

Judge Albert M. Clark, of whose lengthy service on the bench of the Missouri Supreme Court this Court will take judicial notice, after an examination of many of the cases above referred to made this well-justified pronouncement in his opinion in the case of *Moffett* v. *Commerce Trust Company*, 354 Mo. 1098, when, l. c. 1130 (C80), he said (emphasis ours):

> [8] Appellants make many other assignments of error; assailing the constitutionality of Missouri statutes relating to partnership estates, and the probate laws of both Missouri and Kansas; ask us to declare void certain decisions of the Supreme Court of Kansas; invoke the treaty between this country and France in 1803 and the "due process" and other provisions of the State and Federal Constitutions. Most if not all these questions have been decided adversely to appellants by courts of competent jurisdiction in suits brought by appellants or in which they actively participated as defendants. [*Moffett* v. *Moffett*, 131 Kan. 582, 292 P. 947; *Clark* v. *Andrews*, 126 Kan. 23, 13 P. (2d) 294; *Clark* v. *Moffett*, 136 Kan. 711, 18 P. (2d) 555, 290 U. S. 602; *Moffett* v. *Robbins*, 14 Fed. Supp. 602; *Moffett* v. *Robbins*, 81 Fed. (2d) 431, 298 U. S. 675.] *Appellants have not been denied due process. They have not only had their day in court, but their months and years.*

Under the Missouri decisions Judge Clark had the right to take judicial notice of prior decisions of Missouri Supreme Court in related cases.

The records in the instant case show that Judge Reeves of the lower court had before him the opinions in many other cases dealing with the Moffett litigation including, of course, the opinion from which the above quotation is made.

Statement of Respondent Commerce Trust Company concerning the pleadings in the instant case and the issues raised thereby and involved therein.

The original complaint in the instant case was filed in the lower court on February 7, 1947. Petitioner thereafter filed an amended complaint, thus exercising her right to have one free amendment. This amended complaint, consisting of 92 pages, was filed on March 18, 1947, and appears in full on pages (C153-245).

Against the amended complaint respondent Commerce Trust Company filed a motion to dismiss on various grounds. This motion was sustained on December 11, 1947, and was accompanied by the written opinion appearing in 75 Fed. Supp. 303 (769-775).

On account of the many questions raised in this case, we suggest that this Court read this opinion at this point, as it is most exhaustive and complete and fairly meets the contentions made by the petitioner, and discusses extensively the Civil Rights Statutes. In the order dismissing this complaint (1), Judge Reeves said:

> "• • • and it appearing that appellant's amended complaint does not *state a cause of action or one cognizable in this Court* and that her complaint should be dismissed." (Italics ours.) (Here follows the Order of Dismissal (2).)

On December 15, 1947, on application of petitioner the order of dismissal was amended so as to provide that same was without prejudice to the right of petitioner to file amended complaint. The second amended complaint was filed on February 7, 1948, and was later amended by interlineations. Said amended complaint had attached thereto certain exhibits therein referred to and made a part thereof, lettered respectively Exhibit "A" to Exhibit "K," both inclusive, and respectively set forth in full in appellant's printed record.

Exhibit "I" (70) sets forth the *per curiam* opinion of the Supreme Court of the United States, dismissing the appeal from the Supreme Court of Missouri in *Moffett* v. *Commerce Trust Company,* reported in 354 Mo. 1098.

The second amended complaint contained allegations referring to said Exhibits "A" to "K," respectively, and made same and each of same a part of petitioner's second amended complaint.

In said Exhibit "E" (45) petitioner refers specifically to the following cases mentioned on the following pages of her printed record, respectively: (44) *Moffett* v. *Moffett et al.,* 131 Kan. 582; (45) *Clark* v. *Moffett,* 136 Kan. 711; (47) *Clark, Administratrix et al.* v. *Moffett et al.,* 290 U. S. 642, 54 Sup. Ct. 61, 78 L. Ed. 558. The last cases named therein are the cases of *Clark* v. *Moffett,* 136 Kan. 711 (47), *Moffett* v. *Robbins,* 14 F. Supp. 602, and 81 F. 2d 431 (C47). In Exhibit "E" the foregoing cases are also mentioned on pages (C39-40).

In petitioner's second amended complaint, on the pages of her record hereinafter set forth, petitioner refers to the following cases:

(1) Paragraph 26 (15, 16). From other recitals it is manifest that this recital means *Zombro* v. *Moffett,* 44 S. W. 2d 149.

(2) Paragraphs 29, 30, 31, 32 and 33 (16, 17, 18). These paragraphs refer to the litigation which has been described by the parties as "the Comanche suit."

Paragraph 32 (18). This paragraph in its entirety should be read by the Court because among other things it not only charges the Judge of the District Court of Comanche County, but also the Judges of the Supreme Court of Kansas, with intentionally and purposefully having denied Thomas S. Moffett equal protection of the law.

Our Exhibit 17 (C261, 262) shows that the Supreme Court opinion in this case was published in 131 Kan. 546, 292 Pac. 942. We have reproduced in our record in photostatic form the full text of this opinion, including syllabi (C263-273). It will be noted therefrom that the District Judge against whom charges of wrongdoing were made was Hon. Karl Miller and not Judge Hay.

(3) Paragraph 39 (21, 22). This shows that petitioner, as the then plaintiff, appealed to the Supreme Court of Kansas and that court affirmed the judgment of the lower court and that "plaintiff petitioned for certiorari in the Supreme Court of the United States, which petition was denied." This manifestly refers to 131 Kan. 546 and 136 Kan. 711.

(4) Paragraph 48 (26, 27) alleges that the special Probate Judge entered an order on February 7, 1929, ordering Thomas S. Moffett to convey said land (the Hymer ranch) to Commerce Trust Company and that said Special Judge in making said order intentionally and purposefully discriminated against Thomas S. Moffett and in favor of the defendants. It is further alleged therein that the defendants appeared in the Probate Court of Jackson County, Missouri, and caused said Court to make an order directing Commerce Trust Company to sell and convey said land.

Commerce Trust Company's Exhibit 60 (689-710) shows all proceedings in the Probate Court with reference to the sale of the Hymer ranch and that the order of sale (C708) was made by Hon. M. J. Henderson, who was the regular or elected Judge of said court (of which fact your court will take judicial notice).

(5) Paragraph 52 (29, 30). This expressly refers to the Missouri damage suit (reported in 354 Mo. 1098) and contains the following recitals:

"On Saturday, December 30, 1944, said state action was dismissed by said Circuit Court on the ground of misjoinder of parties plaintiff. On appeal to the Supreme Court of Missouri said judgment was affirmed."

On page 30 it is recited, "Plaintiff's appeal to the Supreme Court of the United States from said judgment of affirmance was dismissed." (This clearly identifies the case mentioned as being the case of *Louise McGrew Moffett, etc.*, v. *Commerce Trust Company et al.*, 354 Mo. 1098, 193 S. W. 2d 588.)

(6) Paragraph 49 (27, 28). This refers to the order of the Wyandotte County, Kansas, Probate Court entered in 1931 authorizing the administratrix of the Thomas S. Moffett estate in Kansas to take charge of the partnership estates of Moffett Brothers and Andrews, and Andrews, Lewis and Moffett, and alleges that after same was done and after said Probate Court lost jurisdiction so to do, it entered an order on its records revoking the appointment of said administratrix of said partnership estates. These allegations clearly refer to orders of the Probate Court of Wyandotte County revoking the authority of Grace Torrance Clark to act as administratrix and appointing L. B. Andrews in her stead. Mrs. Clark appealed from these orders, and the District Court of Wyandotte County reversed the orders of the Probate Court. Thereupon, Andrews and others appealed, and the Supreme Court in 136 Kan. 23, 13 Pac. 2d 294, reversed the judgment of the District Court of Wyandotte County, thereby affirming the original orders of the Probate Court.

Our Exhibit 16 (C 249, 250) shows that the Supreme Court opinion in this case was published in 136 Kan. 23 and 13 Pac. 2d 294. We have reproduced in our Record in photostatic form the full text of this opinion, including

syllabi (C 250-251). This case was mentioned by Judge Clark on page 1130 (C 84) of the opinion of the Missouri Supreme Court in *Moffett* v. *Commerce Trust Company,* 354 Mo. 1098, copy of which opinion, with points and authorities, appears in Commerce Trust Company's printed record beginning on page 48.

The aforementioned cases of *Moffett* v. *Moffett,* 131 Kan. 546, 292 Pac. 942, and *Zombro* v. *Moffett* (Mo.), 44 S. W. 2d 149, are specifically referred to on page 713 in the case of *Clark et al.* v. *Moffett et al.,* 136 Kan. 711; and the case of *Moffett* v. *Moffett,* 131 Kan. 582, 292 Pac. 947, is referred to on the same page.

In response to this complaint defendant Commerce Trust Company filed on March 20, 1948, a document entitled: "Consolidated Motions of Separately Moving Defendant Commerce Trust Company," consisting of two parts, Part I of which is set forth on pages 73 to 76 of petitioner's record. Part II thereof is omitted entirely in petitioner's record. Said Part II is a motion to make said second amended complaint more definite and certain in 46 particulars, numbered respectively from Item 1 to Item 46, both inclusive, and consists of 47 pages, exclusive of exhibits.

On April 2, 1948, defendant Commerce Trust Company filed a document entitled: "Amendments to Defendant Commerce Trust Company's Consolidated Motions, Filed March 20, 1948, Entitled: 'Consolidated Motions of Separately Moving Defendant Commerce Trust Company'."

On page 76 of petitioner's printed record she refers to this document and makes the following explanation for incorporating only certain parts thereof in her printed record:

> (fol. 59) "On April 2, 1948, Commerce Trust Company filed 'Amendments to Defendant Commerce Trust Company's Consolidated Motions,' *which*

amendments, as far as they refer to the motion to dismiss on the ground that the second amended complaint does not state a claim on which relief can be granted, are in words and figures as follows:" (Italics ours.)

Petitioner in her printed record then incorporated the introductory paragraph of such amendments (76-77), consisting of 13 lines. The only part of Part III thereof (other than the caption) incorporated in her record, is set forth on pages 77 and 78 thereof and consists of 24 lines. The only part of Part IV thereof (other than the caption) incorporated in her record is paragraph (b) thereof, consisting of 8 lines (78).

On account of petitioner's expurgations we have incorporated said amendments in full on pages 7 to 109, both inclusive, in our printed record. This includes exhibits referred to in, and forming a part of, said Part III, which was a motion to dismiss for failure to state a claim. In order that the Court may appreciate the extent to which petitioner has failed to incorporate in her record the pertinent parts of Part III (being said motion to dismiss for failure to state a claim) we now refer to said Part III in our printed record.

Petitioner, in her printed record, has made many omissions from Part III and Part IV of these Amendments, the nature and extent of some of which are mentioned in the printed record of respondent Commerce Trust Company on page (C7).

So that, what actually appears in Part III of our motion (being the part thereof in which we asked that the amended complaint be dismissed for failure to state a claim), will be readily apparent to this Court, we have reproduced all the pertinent parts of said Part III as Item One in our Appendix to this brief.

As regards Part IV (C 17) petitioner reproduces the

caption thereof, but omits the motion appearing as the initial clause therein, reading as follows: "This defendant separately moves the Court," which motion relates to four subdivisions respectively designated (1), (2), (3) and (4). As regards subdivision (1), she omits all that appears in clause (a) thereof, reproduces what appears in clause (b) thereof, and entirely omits what appears in clause (c) thereof. Said omitted clause (c) is in words and figures as follows:

> "(c) That the court render summary judgment in favor of defendant Commerce Trust Company dismissing plaintiff's action on the ground that there is no genuine issue as to any material facts and that this defendant is entitled to a judgment as a matter of law; or in the alternative,"

She entirely omits the other three alternative motions set forth in subdivisions (2), (3) and (4) of said Part IV, same reading as follows:

> "; or in the alternative, (2) that the court dismiss plaintiff's Second Amended Complaint pursuant to and on the grounds set forth in Part III hereof; or in the alternative, (3) that the court dismiss said second amended complaint pursuant to and on the grounds set forth in Part I of this defendant's Consolidated Motions; or in the alternative, (4) that the court sustain each and all of the various motions contained in Part II of this defendant's consolidated motions and as regards each and every Item thereof."

Said Part III was a separate and distinct motion expressly praying that said Second Amended Complaint be dismissed for the failure to state a claim or claims against this defendant upon which relief can be granted.

We desire to call particular attention to clause (b) of Part III of our Amendments (C 9). This clause was incorporated herein on account of petitioner's disregard of the order made by the lower court on December 11, 1947.

We also bring to the attention of the Court certain of the recitals appearing in Part I of our consolidated motions filed March 20, 1948, directed against the second amended complaint. They are set forth on page 75 of petitioner's record, and are preceded by figures IV, V and VI, respectively.

Petitioner's first document filed subsequent to the filing of our Consolidated Motions and Amendments thereto, was filed on May 24, 1948, and was entitled, "Plaintiff's Counter-Motion to Defendants' Motions." This motion appears in petitioner's record, pages 224 to 233. There (225) the following prayer appeared: "Plaintiff Moves: 1st For an Order Denying All of Defendants' Motions." Therein petitioner also asks for an order compelling defendants to pay plaintiff her reasonable expenses, including reasonable attorneys fees, on the ground that defendants' motions were made in bad faith and for the purpose of delay. Said counter-motion concludes with (233) a prayer reading in part as follows:

> "WHEREFORE, Plaintiff prays that this motion of plaintiff be sustained by *denying defendants' motions,* * * *" (Italics ours.)

POINTS, AUTHORITIES AND ARGUMENT.

Explanatory.

(In the arrangement of the following parts of this brief we have first set forth under designations C-1, C-2, C-3 and under like numbered designations preceded by the letter "C" certain points which we deem it important to be considered at an early stage and have followed same by similar designated points making specific response to specific contentions of the petitioner, and

have incorporated at the end in regular sequence certain additional points and authorities largely taken from our brief in the Court of Appeals, which are stated tersely.

In instances where the argument is lengthy we have placed the argument in a subdivision captioned "Argument" and where the discussion is not lengthy we have indicated that same will not appear in the argument.)

C-1.

Point C-1 appears under the heading "C-1" in our Argument.

C-2.

(The Howard Fee Case)

Point C-2 appears under the heading "C-2" in our Argument.

C-3.

Point C-3 appears under the heading "C-3" in our Argument.

C-4.

In many places in her complaint and in her briefs filed in the lower court and in this Court petitioner has loosely used the words "void" and "without jurisdiction" or equivalent words when the context shows that she is merely complaining on account of some allegedly erroneous decisions.

> *Rooker* v. *Fidelity Trust Co.*, 263 U. S. 413, l. c. 415-416, 68 L. Ed. 362 (opinion by Judge Van Deventer).

In this opinion Judge Van Deventer made very succinct and concise comments, which we think are pertinent to many of the questions which have been raised by petitioner in her briefs and in her second amended complaint. Therein on pages 415-416 he said:

> "If the constitutional questions stated in the bill actually arose in the case, it was the province and

duty of the state courts to decide them; and their decision, whether right or wrong, was an exercise of jurisdiction. If the decision was wrong, that did not make the judgment void, but merely left it open to reversal or modification in an appropriate and timely appellate proceeding. Unless and until so reversed or modified, it would be an effective and conclusive adjudication. (Citing many cases.)

"*Some parts of the bill speak of the judgment as given without jurisdiction and absolutely void; but this is merely mistaken characterization. A reading of the entire bill shows indubitably that there was full jurisdiction in the state courts, and that the bill, at best, is merely an attempt to get rid of the judgment for alleged errors of law committed in the exercise of that jurisdiction.*" (Italics ours.)

(This Point does not appear in Argument.)

C-5.

(This section of our brief is responsive to Section V (pages 31-43) of petitioner's brief.)

Commerce Trust Company, in its respective representative capacities, was not an officer of the State of Missouri, was not an agent of the State of Missouri, and was not an agency of the State of Missouri.

In *Stevens* v. *Larwill,* 110 M. A. 140, l. c. 157, Judge Jackson L. Smith, a veteran Missouri justice, said:

> "It is contended, however, that an administrator is a State officer and as such is included within the meaning of section 12, article 8, of the constitution of this State which declares that, 'no person shall be elected or appointed to any office in this State, civil or military, who is not a citizen of the United States and who shall have resided in this State one year next preceding his election or appointment.' An administrator belongs to the same class of officers as curators, guardians, receivers, referees, and the like,

whose duties are private and concern private interests, and are in no sense of the term public. He is invested with no portion of the soverign functions of the State to be exercised by him for the benefit of the public, and is therefore not an officer of this State within the meaning of the constitutional provision just quoted. We have been referred to no case in which it has been held that an administrator or any one of that class of subordinate officers to which he belongs is a public officer within the meaning of the said constitutional provision. The statute—section 10, Revised Statutes—does not require that an administrator shall have resided one whole year within this State, but only prohibits the appointment of a non-resident. It has been held in New York—71 N. Y. 238—that a referee is not a public officer within the meaning of a provision of the constitution of that State prohibiting judges from exercising any power of appointment to a public office.

"Mechen on Public Officers, section 1, states that, 'a public office is the right, authority and duty duly created and conferred by law, by which for a given period, either fixed by law, or enduring at the pleasure of the creating power, an individual is invested with some portion of the functions of government, to be exercised by him for the benefit of the public. As here used, the word "office" is to be distinguished from its application to such positions as are at most *quasi* public only, as the charge of an executor, administrator, or guardian, and from the offices of a private corporation.' Accordingly, we do not think the respondent's letters should be revoked on the ground of non-residence of this State."

The court, in *Wilcox* v. *Horan*, 10th Cir., 178 F. 2d 162, l. c. 165, said:

"• • • The assertion that a guardian or custodian of the person of an incompetent, appointed by a county court having jurisdiction of such matters, is

an agent or representative of the state is not supported by any authority. While we very much doubt that respondent is a state officer as that term is ordinarily understood, we feel quite certain that her acts are not to be deemed 'state action' within the contemplation of the 14th Amendment. *Snowden* v. *Hughes, supra.*"

(This Point does not appear in Argument.)

C-6.

At all times involved in the instant controversy there was in full force and effect a Kansas statute which authorized foreign executors and administrators to sue and be sued in any court in that state.

Section 22-1308 was in words and figures as follows:

> "22-1308. *Suit by or against foreign representative.* An executor or administrator duly appointed in any other state or country may sue or be sued in any court in this state, in his capacity of executor or administrator, in like manner and under like restrictions as a nonresident may sue or be sued. (G. S. 1868, ch. 37, §203; Oct. 31; R. S., 1923, §22-1308.)"

The Supreme Court of Kansas passed squarely on the validity of this statute as applied to appellee Commerce Trust Company in the case of *Clark* v. *Moffett,* 136 Kan. 711, l. c. 720, *wherein in response to the appellants' challenge of its validity the court said:*

> "It is argued that even if the appointment of the Commerce Trust Company in that capacity was made, it was for Missouri only and did not authorize it to appear in Kansas. Our statute (R. S. 22-1308) authorizes an administrator of another state to sue or be sued in this state."

This statute was passed in 1868.

In 1939 the Kansas legislature enacted what is generally understood to be a model Probate Code (See Laws 1939,

C. H. 180, Section 59-1708, July 1, 1939) wherein Section 22-1308 was re-enacted in the exact language thereof except that the words "a fiduciary" were substituted for the words "an executor or administrator" thus making it possible for all foreign fiduciaries of all types to sue and be sued in the State of Kansas.

In *Moore* v. *Petty*, 135 F. 668, the 8th Circuit, speaking through Judge Hook, in the year 1905, said, l. c. 672:

> "• • • The general rule undoubtedly is that an executor or administrator in his representative capacity cannot maintain an action in the courts of any sovereignty other than that under whose laws he was appointed and qualified, without obtaining an ancillary grant of letters in the state where the action is brought, *unless the right so to do is conferred upon him by the law of the forum.*" (Italics ours.)

(This Point does not appear in Argument.)

C-7.

Petitioner has throughout failed to distinguish the difference between an action for a criminal conspiracy and a civil case charging conspiracy.

Judge Reeves pointed out this distinction in his first opinion and also in his second opinion in the instant case, 87 Fed. Supp. 438, l. c. 442, when he said:

> "There exists no civil action for a conspiracy, and particularly is this true in the national courts. An action may lie for damages suffered by reason of torts committed pursuant to a conspiracy but no action for damages lies for the conspiracy alone. *Sidney Morris & Co.* v. *National Ass'n of Stationers*, 40 F. 2d 620.
>
> 'The gist of such action is • • • the conspiracy, but it is the damages for which the wrongdoer and all who conspire with him are liable.' " Id.

In *Brictson* v. *Woodrough*, 164 Fed. (2d) 107 (10th Circuit), on pages 109-10, the Court said:

"(4) The gist of a civil action for conspiracy is the act or acts committed in pursuance thereof, the damage, not the conspiracy or the combination. Unless injury has resulted from something done in furtherance of the conspiracy by one or more of the conspirators, a civil action will not lie. The combination may be of no consequence except as it bears upon the rules of evidence or the persons liable."

(Does not appear in Argument.)

C-8.

Petitioner's suit is in the nature of a glorified action for malicious prosecution.

She includes in one complaint many alleged causes of action, many of which are based on alleged common law and statutory grounds and, even if well founded, are in no event redressible in a Federal Court in a non-diversity action. As regards the alleged claims on account of the pending suits the case of *Higgins* v. *Realty & Inv. Co.*, 335 Mo. 1010, l. c. 1025, correctly states the universal rule, that no action for malicious prosecution can be maintained until a termination in favor of the parties claiming damages by reason thereof, where it said:

> "In a malicious prosecution suit the necessary elements for plaintiff to establish are: (1) the commencement or prosecution of the proceeding against him or her; (2) its legal causation by the present defendant; (3) its *termination in favor of the present plaintiff;* (4) the absence of probable cause for such proceeding; (5) the presence of malice therein; and (6) damage to plaintiff by reason thereof."

(Does not appear in Argument.)

C-9.

For the purpose of avoiding duplication and repetition, we hereby adopt that part of the brief of Respondents Weede appearing in Point I of their Argument, under the caption entitled: "Res Judicata." We also adopt their Point II.

(Does not appear in Argument.)

Additional Points to be designated C-10, C-11, C-12, and so on, will appear under headings C-10, C-11, C-12, and so on, in our Argument in the latter part of this brief.

STATEMENT OF ADDITIONAL POINTS AND AUTHORITIES.

POINT 1.

The petitioner does not allege or claim jurisdiction on the ground of diversity of citizenship. Jurisdiction in the instant action does not exist on that ground. Petitioner at all times was a citizen of Missouri (6), and defendants Commerce Trust Company (C1, 2), B. C. Howard (C3, 4), and William H. Kopp (C4) were respectively at all times citizens of Missouri.

(This Point does not appear in Argument.)

POINT 2.

Petitioner invoked jurisdiction of the Federal court solely on the ground that the alleged action arose under certain provisions of the Federal Constitution and laws of the United States. (See appellant's record, pages 2, 3.) The lower court had jurisdiction to hear and sustain the motion to dismiss the second amended complaint for failure to state a cause of action (claim) upon which relief can be granted. Jurisdiction is not defeated by the possibility that the averments might fail to state a cause of action upon which petitioners could actually recover.

Bell v. *Hood*, 337 U. S. 678, 90 L. Ed. 939.

(This Point does not appear in Argument.)

POINT 6.

The doctrine contended for by petitioner's counsel if sanctioned, and approved by the Court, would result in the destruction of time-honored precedents and be revolutionary in its effect, because, as applied to the facts in the instant case, it would permit a litigant—after the adverse decision of the trial court, after a judgment of affirmance by the court of last resort of the state, and after denial of a writ of certiorari by the Supreme Court of the United States; and after filing a suit to restrain the enforcement of said judgment in the Federal District Court, and after the adverse decision of that court and after the decision of the District Court had been affirmed by the United States Circuit Court of Appeals, and after the Supreme Court of the United States had refused certiorari, and after the petitioner in one instance had filed in the Supreme Court of the United States all of the necessary and requisite papers to review by appeal the decision of the Missouri Supreme Court and the United States Supreme Court had dismissed the appeal and had later denied a lengthy petition for a rehearing—to set up and raise again the very questions decided against such litigant, and set the Federal courts up as an arbiter of the correctness of every state decision.

(This Point does not appear in Argument.)

POINT 7.

Petitioner's second amended complaint on its face shows that she attempts to charge at least the following judges of wrongdoing: Judge Hay of the Harper County District Court, Judge Karl Miller of the Comanche County District Court, all of the judges of the Supreme Court of Kansas, all of the judges who sat as special judges of the Jackson County Probate Court and who took any action concerning the Moffett litigation, and Judge M. J. Henderson, the elected Probate Judge of Jackson County, who entered the order for the sale of the Hymer ranch. In the application (736) for an injunction to stay the prosecution of Cause 339,134 filed in this Court and heard on March 4, 1950, on page 10 thereof (743) petitioner alleges that on four occasions between August 23, 1943, and December 20, 1949, the judges of the

Circuit Court of Jackson County intentionally and purposefully discriminated against her. In the brief filed by petitioner with Judge Reeves on April 30, 1949 (C955), petitioner insinuates and intimates that the full bench of the Supreme Court of Kansas, and of the Circuit Court of Appeals for the Tenth Circuit, and Federal Judge Hopkins were all participants in the claimed conspiracy along with Kansas District Judge Hay. The formula "purposefully and intentionally" (borrowed from one of the cases cited by her) is used throughout this complaint. It is a mere conclusion. It is not followed by any recital of facts, and it is evident from the entire Record that these allegations are based on the sole ground that the respective judges rendered decisions which petitioner claims were erroneous.

(This Point does not appear in Argument.)

POINT 10.

The often quoted opinions of Judge Lewis of this circuit in *Coleman v. Apple*, 298 F. 718, 720, 721, and of Judge Kimbrough Stone of this circuit in *Owens v. Battenfield*, 33 F. 2d 753, fully sustain our contention that erroneous decision of the state court does not violate any federal constitutional right.

(This Point does not appear in Argument.)

POINT 11.

The order made by Judge Reeves is fully sustained by his comprehensive opinions discussing all of the contentions raised by petitioner. His orders are abundantly upheld by the recent excellent opinion of Judge Collett in *Gibson v. Reynolds*, 172 F. 2d 95, which affirms and sustains the opinion of Judge Miller of Arkansas reported in 77 F. Supp. 629. These opinions are squarely in point. This order is likewise supported by Judge Huxman's opinion in *Polhemus v. American Medical Association*, 145 F. 2d 357.

(This Point does not appear in Argument.)

POINT 12.

In Missouri the appointment of an administrator or executor is not subject to collateral attack.

McWilliams v. *Armstrong,* 320 Mo. 1122, l. c. 1127, 9 S. W. 2d 600, and the numerous cases therein cited.

POINT 13.

In *Brictson v. Woodrough,* 164 F. 2d 107 (the Court will recall that in this case the judges of the 10th Circuit were specially assigned to hear this case as judges of the 8th Circuit) at l. c. 109, Judge Phillips expressly held:

"• • • where a judge has jurisdiction over the subject matter and the person, he is not liable civilly for acts done in the exercise of his judicial function, even though he acts erroneously, illegally, or irregularly, or even corruptly."

See also *Gregoire* v. *Biddle,* 177 Fed. (2d) 579.

POINT 14.

The decisions of federal district and circuit courts of Kansas are binding upon the petitioner and are not subject to collateral attack.

Bernhard v. *Trust & Savings Assn.,* 122 Pac. 2d 892, l. c. 894-895.
Brobston v. *Darby,* 290 Pac. 331, 54 A. L. R. l. c. 1290.
Bruszewski v. *United States,* 181 F. 2d 419.
Caterpillar Tractor Co. v. *International Harvester Co.,* 32 F. Supp. 304, l. c. 306.
Dillard v. *McKnight,* 209 Pac. 2d 387.
General Chemical Co. v. *Standard Wholesale Corp.,* 101 F. 2d 178, l. c. 181.
Taylor v. *Sartorious,* 130 M. A. 23, l. c. 39, 108 S. W. 1089.

(This Point does not appear in Argument.)

POINT 15.

Under the laws of Oklahoma, upon the death of his three co-partners in the partnership of Moffett Brothers Cattle, Land and Lumber Company, Renwick J. Moffett, then sole surviving partner, succeeded to the title to all the partnership property, whether real or personal, in trust for the purpose of settling, liquidating and winding up of the partnership, and had the right to sell the same without any proceedings in court.

Clary v. *Brown,* 190 Okla. 19, 109 Pac. 2d 830.
Neustadt v. *Daube,* 190 Okla. 614, 126 Pac. 2d 999.
Oklahoma Statutes, 1941, Title 58, Sec. 255.
Oklahoma Statutes, 1941, Title 54, Sec. 54.
Taliaferro v. *Reirdon,* 191 Okla. 43, 126 Pac. 2d 696.

(This Point does not appear in Argument.)

ARGUMENT.

C-1.

The decision of the Kansas Supreme Court in the case of *Moffett v. Moffett,* 131 Kan. 582, 292 Pac. 947, clearly established that the Harper County District Court had jurisdiction over the subject matter. The pronouncements therein became the law of the case.

This case expressly upheld the right of Commerce Trust Company to intervene in its respective representative capacities.

This case is also important and very pertinent in that it deals exhaustively with the question of the nature and characteristics of partnership real estate.

The appeal from the decision in the lower court culminating in the opinion in 131 Kan. 582 involved only two

questions: first, whether or not the court committed error in overruling appellant's demurrer to the answer filed by defendant Helen Moffett (now Weede) in the nature of a cross-action praying that before the land be partitioned an accounting be had to determine her share or interest, as well as that of the plaintiff and the other defendants, in the property sought to be partitioned; and second, whether or not the court committed error in permitting Commerce Trust Company to intervene in its two capacities. The Supreme Court decided both of these questions adversely to the contentions of appellant and held in a lengthy opinion that under the laws of Kansas the court had jurisdiction to take an accounting, and further held, l. c. 588:

> "• • • But it is a principle of law, applicable to courts of equity, that such a court, having assumed jurisdiction of the subject matter, will reach out and draw into its consideration and its determination the entire subject matter, and bring before it all the parties interested therein, in order that a complete and effectual final decree, adjusting the rights of all parties, may be entered and enforced."

As regards Commerce Trust Company, this appeal related solely as to its right to intervene in this proceeding at that stage. The appellant raised this contention in the lower court, and the appellate court disposed of that question by the use of the following language, l. c. 588:

> "It is unnecessary to say much about the applications to intervene. It is clear from the allegations in these applications and from the answer of Helen Moffett, which are taken as true for the purpose of this appeal, that it will be necessary, to a substantial extent, for the trial court to treat the real property of the partnership as personalty, and to whatever extent that is necessary to be done the intervener, in its respective capacities, is a proper party to the action. *Appellant contends that the Commerce Trust Com-*

pany is intervening in two capacities which are in conflict. But we think there is no such conflict as would make it difficult for the trial court to ascertain and adjudicate the respective rights of the parties." (Italics ours.)

It is interesting to note that Thomas S. Moffett did not in this case, either in the lower court or appellate court, challenge the validity or regularity of the appointment of the Commerce Trust Company to act in these capacities. The decision in this case became the *law of the case*. This principle is so well established that citation of authorities is unnecessary.

Judge John C. Pollock, veteran Kansas jurist, who had had long service in the state and federal courts of Kansas, recognized this principle in his memorandum opinion handed down on April 20, 1931 (W262). Therein he further stated: "* * * The decision of the lower court was made by a court having jurisdiction to determine the question involved, and whether said order was right or wrong in law it was made by a court having jurisdiction to determine same, and hence not having been reviewed is the law of the case unless and until corrected on review by some court having the power to do so."

Petitioner's counsel has for almost twenty years ignored and failed to recognize this salutary and well-established principle so forcefully brought to his attention in 1931.

When the petitioner again challenged the right of the Commerce Trust Company to intervene the court very pertinently said in *Clark* v. *Moffett*, 136 Kan. 711, l. c. 720:

> "Appellants contend that the Commerce Trust Company is without capacity to represent the Moffett Brothers partnership in this action. When the case was in this court before, one of the points determined was that it was proper for the trial court to permit the Commerce Trust Company to intervene in this

action in its capacity as administrator of the partnership estate of Moffett Brothers. Ignoring the former determination of this question, appellants present two reasons in support of their contention. *First,* that the appointment was made by one who assumed to act as special judge, or judge pro tem, of the Probate Court of Jackson County, Missouri, who was not so chosen in accordance with the constitution and statutes of Missouri, therefore his order making the appointment is void. The trial court found that his selection was made in accordance with the constitutions and statutes of Missouri, as interpreted by the Supreme Court of that state. The finding appears to be sound. But, passing that, he was there acting as judge of the Probate Court and did make the appointment. No appeal has been taken from that order. The Commerce Trust Company has been acting under the appointment since December 28, 1928. He was at least a judge *de facto.* The regularity of his appointment, or his acts as judge, cannot be collaterally attacked in this proceeding. (*Briggs* v. *Voss,* 73 Kan. 418, 85 Pac. 571; *Keys* v. *Keys,* 83 Kan. 92, 109 Pac. 985.) *Second,* it is argued that even if the appointment of the Commerce Trust Company in that capacity was made, it was for Missouri only and did not authorize it to appear in Kansas. Our statute (R. S. 22-1308) authorizes an administrator of another state to sue or be sued in this state * * *."

The real estate involved in the Harper County Partition-Accounting suit (Cause No. 7374) belonged to the partnership estate of Moffett Brothers. The case mentioned in the caption dealt exhaustively on pages 585-587, with the difference between the so-called English Rule relating to partnership real estate and the American doctrine on the same question, and discussed these two rules in the light of the contentions of the respective parties to the litigation. After referring to the doctrine in America, on page 586, the court said (l. c. 587): "Our

own cases are in harmony with this view." Here the court next cites nine Kansas cases. On the same page, the court said: "The share or interest of the respective parties in such real property can be determined, of course, only by determining the status of the partnership and the obligations of each member to it and to each other."

The court next said: "Appellant contends that the court does not have power to make such an accounting in the partition action." After devoting considerable space to the discussion of this contention, the court, at the conclusion of its opinion (l. c. 588) said: "On the whole it seems quite clear that there should be such an accounting as is prayed for by the defendant and intervener in order to determine the respective interests of the parties in the land sought to be partitioned."

C-2.

(The Howard Fee Case)

Petitioner, in her petition and brief, again makes the unwarranted and untenable contention that the decision of the Supreme Court of Missouri in the Howard Fee Case (345 Mo. 741) rendered void the judgments of the Harper County District Court. The Missouri Supreme Court did not so decide or attempt to so decide.

The Howard Fee Case, being an appeal from the Probate Court, the jurisdiction of the Supreme Court was purely derivative, and even if the Supreme Court had attempted to so decide (which it did not), it had no jurisdiction to determine any matter other than that which was directly involved in the Probate Court, to-wit: The allowance of an additional fee to Mr. Howard, and the approval of compensation already paid to him.

In Missouri, appeals from the Probate Court to the Circuit Court are tried *de novo,* and the Circuit Court and the other appellate courts have no jurisdiction, or power to decide or determine any question not directly involved in the Probate Court.

The leading case in Missouri sustaining the foregoing, is *State ex rel. Burns* v. *Woolfolk* (*Banc*), 303 Mo. 589, 262 S. W. 346. This case involves a controversy relative to the removal by the Probate Court of an administrator, and it was claimed by relator that the Circuit Court had no jurisdiction to proceed in the matter of removing one Burns and appointing one Linder in his stead. In the Burns case, the court said:

> "Section 34, Article VI, of the Constitution of Missouri, gives the probate courts of the State exclusive original jurisdiction in all matters appertaining to probate business, including the granting of letters of administration, the settling of accounts of executors and administrators, etc. The statutes, Sections 1, 3, 4, 48, Revised Statutes, 1919, relating to the granting of letters of administration approving bonds, accounting, etc., vest probate courts alone with original jurisdiction of such matters. Under Article XII, Chapter I, Revised Statutes, 1919, circuit courts have only appellate jurisdiction. *The Circuit Court here had jurisdiction to consider only matters considered, adjudged and appealed from in the Probate Court. The Court of Appeals in reversing the judgment could order the Circuit Court to adjudge only those questions.* After the Circuit Court had rendered judgment in the matter appealed to it from the Probate Court, it was the duty of the clerk of the Circuit Court to certify a transcript of the record of its proceedings to the Probate Court. (Sec. 291, R. S., 1919)." (Italics ours.)

This pronouncement is abundantly supported by the following cases: *Smith* v. *St. Louis Union Trust Co.*, 340 Mo. 979, 983, 104 S. W. 2d 341, 343. *In re Harr & Harr's Estate*, 224 M. A. 6, 16, 22 S. W. 2d 209, 214. In re *Mills' Estate*, 349 Mo. 611, 162 S. W. 2d 807. *Branson* v. *Branson*, 102 Mo. l. c. 620. See also, Section 291, R. S. Mo. 1939 (R.

S. Mo., 1929, Sec. 292) (1949 R. S. Mo., 467.090) reading as follows:

> "Sec. 291. *Circuit or other appellate court to hear de novo.*—Upon the filing such transcript and papers in the office of the clerk of the circuit court, or other court having appellate jurisdiction in the county, the court shall be possessed of the cause, and shall proceed to hear, try and determine the same anew, without regarding any error, defect or other imperfection in the proceedings of the probate court. (R. S. 1929, 292.)"

In this connection it is to be borne in mind that the Probate Court had before it for consideration two questions, and two questions only: First, whether or not Claimant Howard, who had already received $1,300.00 on account of legal services, was entitled to any additional compensation; and, second, whether or not the Probate Court should approve the payment of the $1,300.00 already made to him. The Probate Court made claimant an additional allowance and approved this prior payment. The Circuit Court approved the prior payment and increased Mr. Howard's allowance from $7,770.00 to $11,500.00. The Supreme Court approved the payment of $1,300.00 and denied Mr. Howard any additional compensation. Throughout, Louise McGrew Moffett individually and as executrix of the estate of Thomas S. Moffett, her deceased husband, resisted the allowance of any additional fee to claimant, and endeavored to prevent the approval of the payment of $1,300.00.

In an early part of the opinion in 345 Mo. 741 (l. c. 745), the court said: "The Commerce Trust Company was the administrator *de bonis non* of the estate, or so considered for the purpose of this opinion." In the opinion, the court next refers to the nature of Mr. Howard's claim (l. c. 745). The court next says:

"The record covers nearly 1,400 pages and the briefs cover nearly 700 pages, and many alleged grounds are urged by appellant to support the contention that the judgment should be reversed, *but the conclusion we have reached makes it unnecessary to consider but one of these grounds,* viz., that, under the facts, claimant is not entitled to any fee from the Moffett Brothers estate." (Italics ours.)

On page 746, the court said:

"August 17, 1928, Helen Moffett, John's widow, commenced proceedings in the probate court to remove Thomas S. as executor of the John Moffett estate on the grounds that the interests of the John Moffett estate and the Moffett Brothers estate were conflicting. November 28, 1928, Thomas S. was removed as executor of the John Moffett estate, and the Commerce Trust Company (Kansas City) was appointed administrator *de bonis non* of the estate. December 22, 1928, the trust company, proceeding under Section 86, Revised Statutes 1929 (Mo. Stat. Ann., sec. 86, p. 52), claims to have become administrator of Moffett Brothers estate in Missouri. It is contended by appellant that the trust company was not legally authorized to administer the Moffett Brothers estate, *but, as stated, we shall consider only one question.*" (Italics ours.)

In this opinion, the court refers to some of the cases dealing with prior litigation in the Kansas courts, to which reference has been made in another section of our brief. It is apparent from reading this case that the only questions decided were whether or not Mr. Howard was entitled to any additional fee, and whether or not the prior payment by Commerce Trust Company should be approved. It is too evident that the court denied Mr. Howard any additional compensation solely on account of the fact that he represented conflicting interests.

On page 751, the court said:

> "Perhaps claimant rendered services for the Moffett Brothers estate of the value of $1,300 when he was not representing conflicting interests. That is not made clear, hence in the situation, we do not think that we should disturb the approval of the payment of the $1,300.
>
> The judgment should be reversed and the cause remanded with directions to enter a judgment denying claimant any additional fee, but approving the payment of the $1,300, and it is so ordered."

The opinion in the Howard Fee Case was handed down in Division 1 of the Missouri Supreme Court on March 6, 1940. Almost six years later the same division of the Supreme Court of Missouri, on February 11, 1946, handed down its opinion in the case of *Moffett* v. *Commerce Trust Company,* 354 Mo. 1098, 193 S. W. 2d 588. This Court will take judicial notice that on the last-named date the court consisted of the same members as on the date of the rendition of the opinion in the Howard Fee Case, except that Commissioner Laurence Hyde had in the meantime been appointed judge in lieu of another judge who had resigned. In this case the petitioner (then appellant) raised the identical question she is now raising, to the effect that the decision in the Howard Fee Case had the effect of rendering void the decisions of the Kansas District Court. In answer to this contention, the court, speaking through Judge Clark, said (l. c. 1129):

> "(6) *In Re Moffett Bros. Partnership Estate,* 345 Mo. 741, 137 S. W. (2d) 507, grew out of an attorney fee allowed B. C. Howard for representing Commerce Trust Company as administrator of the partnership estate, Mrs. Moffett, individually and as executor of her husband's estate, resisted the allowance in the probate, circuit and supreme courts. No point was presented or decided as to Mrs. Moffett's right to

> appear in both capacities. *The only point decided was that Howard was not entitled to an additional fee.* • • • (Italics ours.)

Thence, when petitioner's counsel raised this contention before the same court which tried the Howard Fee Case, that court, with full knowledge of its record and its opinion in the Howard Fee Case, positively stated: *"The only point decided was that Howard was not entitled to an additional fee."* (Italics ours.)

From the foregoing it abundantly appears that in the Howard Fee Case the Missouri Supreme Court emphatically twice said that it would consider only one question. Petitioner's counsel, apparently not believing that the Supreme Court meant what it said in its opinion, again raised this question, and the court positively said, in response to this contention: "The only point decided was that Howard was not entitled to an additional fee."

Eminent Robert F. Walker of the Supreme Court of Missouri, in the case of *Duvall* v. *Duvall,* 316 Mo. 626 (l. c. 635), 291 S. W. 48, reviewing a case where the same situation appeared, very appropriately said:

> *"To contend in the face of the plain and unmistakable words of this opinion that it was intended to include things not expressed therein, but on the contrary intentionally omitted therefrom, is to invoke the hitherto unheard of doctrine of judgment by implication."* (Italics ours.).

The Howard Fee Case, and what has been decided thereby, was the subject of a colloquy and much discussion, at an oral hearing before Judge Reeves on October 16, 1947. On the day following, petitioner's attorneys wrote a letter to Judge Reeves which appears (50-53), and mailed copy thereof to Respondent Howard. Petitioner's counsel, November 21, 1947, wrote another letter to Judge Reeves (see Exhibit "G," 54-65), and mailed copies

thereof to the attorneys for all of the then defendants, now respondents (65). To this letter the attorneys for this defendant, now respondent, Commerce Trust Company, on November 25, 1947, replied. Petitioner in her Exhibit "H," appearing on (66-69) quotes only excerpts from this letter from Commerce Trust Co. Our letter consisted of 16 typewritten pages and is reproduced in full, with end of page notations, in the printed record of Commerce Trust Company (C113 to 129). We refer to this letter in another part of our brief. At this time we earnestly request the Court to read what is said therein concerning the Howard Fee Case, and at this time, particularly, what appears on pages (C124 to 126) thereof. The second amended complaint was not filed in this cause until February 7, 1948. The petitioner's insistence that the decision in the Howard Fee Case renders void the judgments of the Kansas District Court results in an absurdity. In this anomalous situation, she bases her rights to recover in the instant action on the theory that these Kansas judgments were void. When confronted with the fact that the Kansas courts had full jurisdiction over the parties and the subject matter, and did render these decisions which withstood her assault in all of the courts, she now seeks to establish their alleged voidness on the sole ground that the effect of the Howard Fee Case was to reverse and set aside the decisions of the Kansas Supreme Court, and that inasmuch as the Howard Fee Case was later in point of time, its decision had the effect of overruling and setting aside the Kansas judgments. THE SUPREME COURT OF MISSOURI HAD NO JURISDICTION TO SO DECIDE, AND WE ASSERT WITH CONFIDENCE THAT THERE IS NO PREDICATE OR JUSTIFICATION OR WARRANT FOR PETITIONER'S CONTENTION THAT THE SUPREME COURT OF MISSOURI DID SO DECIDE.

C-3.

There was an Adversary Trial in the Harper County Suit.

This is, we think, clearly demonstrated by recitals appearing in the following opinions, all of which are expressly mentioned in the complaint.

In the opinion in the case of *Clark* v. *Moffett*, 136 Kan. 711, the following appears on page 714 (C29):

> This controversy, so comparatively simple in its broader aspects, as above outlined, has been complicated by the manner in which the litigation has been conducted by injecting into it a number of questions relating to practice or procedure and technical questions, many of which have little or no substantial merit, with the result that the parties have presented to this court for its analysis and its consideration 1740 pages of printed abstracts and briefs. Notwithstanding the extraordinary and wholly unnecessary bulk of the matter presented, we have endeavored to go through it carefully and painstakingly, and have done so as fully as our time would permit, and will treat and dispose of all the questions presented that have any semblance of merit.

In the same opinion on pages 715-16 (C30-31) the following appears:

> Appellants complain because the court received in evidence the summary of the books made by the accountants, "Commerce Trust Company Exhibit No. 8," and contend that it was incompetent and hearsay, and they contend that without it the evidence was insufficient. Naturally the original books were voluminous. They had been brought to the court in large boxes and trunks. They had been in possession of the plaintiffs, who had helped keep the books in recent years and were familiar with them. It was appropriate for a summary to be made by some one from them, collecting and properly setting down the entries or items bearing upon the controverted issues to be determined by the court. The trial court ad-

mitted this summary in evidence as informative only and not conclusive, and permitted the parties to refer to the original books as much as they desired and gave them ample time to do so. All other evidence relating to this indebtedness, the books and entries therein which either party offered, was received by the court. There is no contention now that this summary was not an appropriate and accurate one compiled from the books of the partnership. There was no error in receiving it in evidence.

There next appears on page 723 of said opinion (C38), the following:

Finally it is contended plaintiffs did not have a fair trial, and that this is indicated by rulings and remarks of the court as the trial progressed. We have carefully examined the record and all counsel have said on this point and find the contention to be devoid of merit.

The following appears on page 723-724 (C38-39) of said opinion.

As before stated, the parties were in agreement as to the shares of the parties in the real property to be partitioned, except as they might be modified by an accounting. The accounting involved (1) the amount the Moffett Brothers Cattle, Land and Lumber Company owed Moffett Brothers; (2) the amount Thomas S. Moffett owed Moffett Brothers; and (3) the amount Moffett Brothers owed John Moffett. As to the first two of these three items, while the amounts had to be ascertained, they presented no serious controversy. The parties appear to be satisfied with the judgment concerning them. They are involved in this appeal incidentally only. The third item is the one around which the battle of the trial raged. Much feeling was displayed. What caused this, or who is to blame for it, we shall not pause to consider, if, indeed, the record discloses. Perhaps because of it many contentions were made which were not well founded. Some tactics were indulged in, the

obvious purposes of which were to impede rather than to aid the orderly administration of justice. With this attitude prevalent it is fortunate that the trial was before an able and experienced trial judge who could winnow the wheat from the chaff. While doing so the court gave the parties ample time for trial and a fair opportunity in the introduction of evidence. The judgment is fully sustained by the evidence, and, as we view it, in its main features, at least, is the only one which properly could have been reached from the evidence.

The judgment is affirmed.

In the case of *Moffett* v. *Robbins,* 81 Fed. 2d 431 (C40), on page 437 (C46), the court said:

> [13] The Judgment is assailed on the further ground that there was no adversary trial. Louise McGrew Moffett, as sole beneficiary of the estate of Thomas S. Moffett, Grace Torrance Clark, as administratrix with the will annexed of that estate and administering the estate of Moffett Bros. in Kansas, and all others having any interest in the estate of the partnership, were parties to the action. The purpose of the proceeding was an accounting and partition; the issues were formed and the crux of the litigation concerned itself very largely with the asserted claim that the partnership was indebted to the estate of John Moffett. Louise McGrew Moffett and Grace Torrance Clark together waged vigorous but unsuccessful opposition to that claim. Counsel who represented them were paid $3,900 from the partnership funds as compensation for their service. Grace Torrance Clark made such payment. The trial consumed several days; all questions were seemingly considered thoroughly; extended findings of facts and conclusions of law were made dealing with every feature of the complicated situation; and an exhaustive judgment was entered. *In these circumstances, the mere allegation that there was no adversary trial is a conclusion which the record affirmatively disproves.* (Italics ours.)

In the Howard Fee case, 345 Mo. 741 (the case frequently cited and relied upon by petitioner and which petitioner incorporates in full with syllabi and court reporter's points and authorities as Exhibit "E" to her complaint (37-50) and which case petitioner sets forth in full without syllabi or reproduction of points and authorities on pages (692-701)), the following recital appears on page 749 (47):

> Appellant in her statement says that claimant "in one of his pleadings" in the partition-accounting suit, alleged that Mrs. Clark, as administratrix of Moffett Brothers estate in Kansas "was without power to make a defense on behalf of said partnership estate" in that suit. Claimant devotes forty pages of his brief to what is called an "analysis of appellants' statement of the case," and says that Mrs. Clark, as administratrix of the Moffett Brothers estate in Kansas, did appear for and represent said estate in the partition-accounting suit, and claimant goes on to say in this "analysis" that Mrs. Clark, as administratrix of Moffett Brothers partnership estate in Kansas, "paid thousands of dollars of Moffett Brothers partnership estate money out to attorneys, Martin J. O'Donnell and A. E. Watson, for helping her in" the partition-accounting suit. Which means, as we read, that attorneys O'Donnell and Watson, and not claimant, resisted the claim of the John Moffett estate against the Moffett Brothers estate in the partition-accounting suit.

In the case of *Moffett* v. *Robbins*, 81 F. 2d 431, on page l. c. 436 (C45), the court said:

> [10] It is contended that the judgment lacks validity because Grace Torrance Clark as administratrix of the estate of Moffett Bros. was not a party to the action.

After discussing this contention at considerable length, in which the facts were stated, the court said:

A court of equity should give meager heed to the belated contrary argument now advanced.

In the same opinion the court discussed the charge of fraud made by the appellant and disposed of same in a lengthy subdivision 8, 9, appearing on page 436, and held that these charges of fraud were not well founded.

Under rules promulgated by the Supreme Court of Kansas relating to procedure in district courts the Journal Entry of Judgment is prepared, submitted to the court and formally entered after the rendition of the judgment. Reference to these rules is made in another part of this brief.

C-10.

Response to subdivision II and subdivision III of petitioner's brief (pages 21-28), and to other parts thereof, which present petitioner's erroneous contention that the lower courts have erroneously held that she is not entitled to recover under the provisions of the Civil Rights Statutes.

Petitioner's brief in this case was filed on May 26, 1951, and served upon respondents early in June, which was prior to the handing down on June 4, 1951, of the memorable and belated opinion in the case of *Collins* v. *Hardyman,* No. 217, October term, 1950, which had been under submission since early in January of 1951. In this opinion your Court deals with many of the very questions which are urged by petitioner and decides same adversely to her contentions.

It is to be noted that your Court granted certiorari on account of the alleged conflict between the views of the Court of Appeals for the 8th Circuit as expressed in *Love* v. *Chandler,* 124 F. 785, and those of a majority of the Court of Appeals for the 9th Circuit as expressed in the *Hardyman* v. *Collins case,* 183 Fed. (2d) 308.

In the lower court Judge Reeves based his first opinion

as to this point on the case of *Love* v. *Chandler* and kindred cases (R773-774); and in the instant case the Court of Appeals expressly cited (Pro. 8) and relied upon the same case of *Love* v. *Chandler,* together with the cases of *Gregoire* v. *Biddle,* 2 Cir., 177 F. (2d) 579, 581-582; *Campo* v. *Niemeyer,* 7 Cir., 182 F. (2d) 115, 118; *Bottone* v. *Lindsley,* 10 Cir., 170 F. (2d) 705, 707; all of which cases had been cited in the brief of respondents filed in the Court of Appeals. The 8th Circuit Court of Appeals mentioned the *Hardyman* v. *Collins case,* 183 Fed. 308 (Pro. 8) and discussed and distinguished same on (Pro. 11 and 12), and on (Pro. 12) the court said:

> "• • • Here the complaint fails to show that plaintiff has suffered or will suffer the deprivation of a Federal right. The Federal Constitution does not guarantee a citizen against loss through fictitious or fraudulent litigation or through erroneous decisions of State courts on questions of State law nor, as we have seen, does it guarantee uniformity of decisions on the part of State courts nor protect the citizen against the invasion of private rights by private parties."

What the Eighth Circuit said is fully supported by the majority opinion recently rendered by your Court in the above-mentioned case of *Collins* v. *Hardyman.* The Court of Appeals for the 8th Circuit could have pointed out another distinguishing feature between the instant case and the *Hardyman* v. *Collins* case. The complaint there was predicated at least in part on the contention that under the facts in that case the plaintiffs there had been deprived of certain seminal and fundamental rights which were granted to them under certain specific provisions of the Federal Constitution not applicable to any situation in the instant case.

On account of these controversial matters having been finally settled by your Court we shall not refer further

or discuss any of the authorities cited in petitioner's brief in support of this contention except that we shall in a later section of our brief discuss the cases mentioned by petitioner as being in conflict with the opinion of the 8th Circuit in the instant case. Of course, what is said in these cases, if anything, which is contrary to the recent opinion of your Court, is no longer the law.

C-11.

Response to subdivision VIII of petitioner's brief (pages 47-49); and to other parts of said brief relating to the question of the jurisdiction or power of a court to render a particular judgment in a particular case.

This section of petitioner's brief deals with the question of the right of the court possessed with full jurisdiction over the parties and the subject matter to *render a particular judgment in a particular case.* Apparently it is included in petitioner's brief on account of her contention that the Kansas courts accorded Helen Moffett (now Weede) certain rights as his widow; whereas under the law she had no such rights by reason of the fact that John Moffett was a bachelor when he made his will and later died childless.

This contention is, we think, based on an erroneous construction of the Vanek case. We contend that the decision in the case of *Vanek* v. *Vanek,* 104 Kan. 624, decided the law exactly contrary to petitioner's contentions and that this is demonstrated by the 2nd syllabus of the opinion in that case, reading as follows:

> "2. Same—Construction of Statute. The provision of the statute that 'any married person having no children may devise one-half of his or her property to other persons than the husband or wife' (Gen. Statt., 1914, No. 11791), applies to the operation of wills made before marriage as well as after,"

and further, this is demonstrated by the recitals appear-

ing in subdivision 2 of that opinion near the end thereof. Petitioner cites, on page 49 of her brief the case of *Clevinger* v. *Figley,* 68 Kan., l. c. 407, and seems to place great reliance thereon. In the official reports, 68 Kan., this case begins on page 669. Petitioner's l. c. citation refers to page 707. **This case does not support petitioner's contention and is one of the leading authorities against her contention.**

In prior proceedings in the instant case this case has been cited several times by petitioner and we had occasion to make a careful review of same. It is apparent that the quotation reproduced by petitioner therefrom on page 49 does not in anywise refer to the facts in the Clevinger case but is an extract from the opinion in the case of *In re McNeil* appearing on page 366 of the same volume (68 Kan.), and was used by the court in the Clevinger case to make a distinction between the applicable principles to the facts in the Clevinger case and the applicable principles to the facts in the McNeil case. The case of *In re McNeil* was a habeas corpus proceeding. The facts show that McNeil was tried and convicted for an offense where the statutes provided for a jail sentence *or* a fine, and the court had sentenced him to jail *and also* imposed upon him *a money fine.* In the Clevinger case it was the contention of the losing parties that the judgment assailed was void because the land involved was a homestead and the judgment of the court authorizing the sale was violative of the express provisions of the statutes of Kansas. The syllabus in the Clevinger case is in words and figures as follows:

> "PRACTICE, DISTRICT COURT—Foreclosure—Joint Consent—Judgment Conclusive. In an action to foreclose a mortgage given by the owner of land jointly with the guardian of his insane wife, the District Court has jurisdiction to determine whether or

not the premises were a homestead at the time the mortgage was executed, and to decide whether or not the instrument expressed the joint consent of husband and wife; and a judgment involving an erroneous decision of those matters is not open to collateral attack, but is valid and binding upon the parties and their privies until corrected in a direct proceeding for that purpose."

This Court will take judicial notice of the significance under the laws of Kansas of a syllabus to an opinion of its Supreme Court. By an examination of this case it will be readily apparent that it does not support the contention of the petitioner but it is entirely contrary thereto. We invite the consideration of the Clevinger case in its entirety because the eminent judge who wrote the opinion devoted 14 pages to a review of cases of that court and other jurisdictions dealing with the question of the power of a court (possessed of full jurisdiction over the parties and the subject matter) to enter a particular judgment in a particular case.

Distinguished Judge Hyde, speaking for the Missouri Supreme Court, rendered an illuminating and comprehensive opinion in dealing with the power of the court (possessed of jurisdiction over the parties and the subject matter) to adjudge title contrary to mandatory statutes, in *McIntosh* v. *Wiggins*, 356 Mo. 926, 204 S. W. (2d) 770. We refer this Court to what the Missouri Supreme Court said on this question, l. c. 931-932. This opinion is squarely in point and expressly refutes the erroneous contentions made by petitioner in the above regard and likewise refutes other contentions made by petitioner in her brief. It said:

"• • • Such a doctrine would dangerously unsettle land titles. On the contrary, we have held 'that, when a court has jurisdiction, it has jurisdiction to commit error.' (*State ex rel. McGrew Coal Co.* v. *Ragland*,

339 Mo. 452, 97 S. W. (2d) 113.) Therefore, 'no error in the exercise of such jurisdiction can make the judgment void,' nor can 'errors of law in connection therewith.' (31 Am. Jur. 66, Sec. 401; see also 49 C. J. S. 878, Sec. 449.) *State ex rel.* v. *Sevier, supra,* held void an attempt by a court to make an order which it did not have jurisdiction to make. (See also *State ex rel. Missouri State Life Ins. Co.* v. *Hall,* 330 Mo. 1107, 52 S. W. (2d) 174.) Attempting to exercise jurisdiction, which a statute prohibits a court from exercising is a very different matter from making an erroneous decision as to the construction or application of a statute in a case which the court has jurisdiction to decide."

Kansas court in the "Comanche case" and in 1931, Cause 7374 in 1932 expressly held that respondent Moffett (now Weede) by reason of her election under the laws of Kansas was entitled to one-half of the real estate belonging to John Moffett. Petitioner is now many years later attempting by collateral attack to deprive her of the rights accorded her under these judgments which withstood assault in all of the courts.

C-12.

Response to subdivision II, subdivision IV, subdivision VI and other subdivisions of petitioner's brief, contending that the decision of the Court of Appeals in the instant case is in conflict with the decisions of the Courts of Appeals of other circuits.

In support of this contention respondent places primary reliance on the cases hereinafter mentioned and referred to and discussed. We earnestly insist the opinion of the 8th Circuit in nowise conflicts with these cases and that if there should be any conflict that conflict is set at rest by the late decision of your Court in *Collins* v. *Hardyman,* 217 October term, 1950.

Picking et al. v. *Pennsylvania R. Co. et al.,* 151 F. (2d) 240, at l. c. 249-250.

The Picking case has been the subject of frequent discussion since its rendition on August 28, 1945, and has been distinguished in many cases. We think it sufficient to say that that action was against state officials, with the exception of the Pennsylvania Railroad and perhaps others who were charged as co-conspirators, and that the most serious charge contained therein is the charge that the justice of the peace of New York denied the plaintiffs a hearing, in violation of the Constitution. There are no points of similarity between the facts in the Picking case and the facts in the instant case.

Valle v. *Stengel,* 176 F. (2d) 697.

This case involves racial discrimination. Part of the plaintiffs were negroes and part were white persons. They claimed that their Civil Rights were violated on account of their having been forcibly prevented from using a private swimming pool operated in connection with an amusement park. Defendant Stengel was chief of police of the borough of Ft. Lee, New Jersey, and consequently was an officer of the State of New Jersey. Certain of the other defendants were the individuals who managed the park. All of the defendants were charged as co-conspirators. The court, l. c. 704, said:

> "Since, as we have demonstrated, Chief of Police Stengel was acting under color of law, albeit in direct violation of R. S. 10:1-2, N. J. S. A., we entertain no doubt that against the background of the 'privileges or immunities' clause of the Fourteenth Amendment construed in the light of the Slaughter-house cases, *Paul* v. *Virginia* and *Ward* v. *Maryland,* Stengel must be held to have deprived the plaintiffs of the equal protection of the laws."

And on the same page the court further said:

> "We conclude, therefore, that the complaint does state a cause of action because it alleges that civil

rights guaranteed to the plaintiffs by the Fourteenth Amendment and protected by the Civil Rights Acts were invaded by Stengel, acting under color of State law.''

It is readily apparent that there are no facts in the instant case which are in anywise comparable to the facts in the Stengel case.

McShane v. *Maldovan*, 172 F. (2d) 1016.

The defendants in this case were a justice of the peace of the State of Michigan and the constable of his court and others. Plaintiff asserted that she demanded a jury trial by an impartial jury to which she was entitled *by the laws and Constitution of Michigan*, and that the justice of the peace and constable did not follow the law. In consequence thereof she suffered an illegal conviction and sentence and ''was required to appeal her case to the State Circuit Court, where before an impartial jury, she was acquitted.'' In the opinion the court discussed many cases and on page 1022 discussed at length *Bottone* v. *Lindsley*, 150 F. (2d) 705, and distinguished that case from the facts of the case under consideration and quoted approvingly some of the recitals in the Bottone case.

We confidently contend that there are no facts in the instant case which are comparable to the facts in the McShane case.

Under subdivision I, subdivision II, subdivision VI, and elsewhere in her Argument (and also in our Petition filed in this case), the petitioner has referred to an isolated sentence appearing on page 248 of the opinion of the Court of Appeals in the instant case (Pro. 11). She erroneously contends that the recitals in this sentence which are excerpted and stripped from its context, conflict with the decisions of all other circuits and the courts of Missouri, Kansas and England. We shall give con-

sideration to this absurd and unfounded contention in our subdivision C-13 of the instant brief.

C-13.

Response of Commerce Trust Company to Subdivision I, Subdivision II, Subdivision VI, and elsewhere in her Argument and in her Petition, that a sentence appearing on page 248 in the opinion of the Court of Appeals (Pro. 11) conflicts with decisions of all circuits and the Courts of Missouri, Kansas and England.

We think that there is nothing in this erroneous contention which is worthy of reply. We invite the careful scrutiny of the criticized sentence, and ask this Court to consider same in the light of its context in the same paragraph, and in the light of other recitals in the able opinion of the Court of Appeals for the 8th Circuit. Petitioner's counsel attempts to dissect and dismember this sentence and place a construction thereon which we think is not warranted and was not contemplated or intended by the authors of the opinion. If this sentence is to be subdivided, we think the following method of subdividing same would clearly reflect what the court meant by this subdivision, and in doing so, we shall include the one line sentence immediately following this recital. This would result in same being reproduced as follows: "* * * But assuming that the state proceedings were not within the jurisdiction of the courts which decided them * * * nothing in the Civil Rights Acts gives the Federal Court jurisdiction to review them." And secondly, or assuming that this state court proceedings "were contrary to state law or procured by fraud or perjury, they were not void but, at most, erroneous" (and) "nothing in the Civil Rights Acts gives a Federal Court jurisdiction to review them." Nothing in the Civil Rights Acts gives a Federal Court jurisdiction solely because a judgment assailed is void or

voidable, or because a lower court rendered an erroneous decision. There is nothing in this sentence which in anywise indicates that this Court by this hypothetical paragraph intended to say a "void judgment" was binding unless set aside. In writing this sentence authors may have had in mind the erroneous contentions of the petitioner as to the construction of the case of *Vanek* v. *Vanek*, 104 Kan. 624, hereinbefore discussed.

C-14.

Response of Respondent Commerce Trust Company to Petitioner's subdivision VII erroneously contending that the lower court committed error in failing to pass on the motion relating to summary judgment.

The amendment made to the Rules by the provisions of 12 (b) (h) did not become effective until March 20, 1948. Prior to that time, and on December 11, 1947, Judge Reeves sustained a motion to dismiss, based on the Rules as they then existed. Petitioner filed her Second Amended Complaint on March 8, 1948, concerning which the lower court said (R776-777):

> "In drawing the Second Amended Complaint able counsel for plaintiff has sought to avoid the reasoning and conclusions of the opinion filed with the order dismissing the First Amended Complaint. Counsel did this by alleging that, in the several court proceedings used by the defendants for the deprivation of plaintiff's rights, the judge, in each instance, purposely and intentionally made orders and entered decrees violative of the rights of plaintiff and those under whom she claims."

The court further stated:

> "The several defendants have filed motions to dismiss on various grounds, including the one that the Second Amended Complaint bears such similarity to the complaint dismissed as to bring said Second

> Amended Complaint under the bar of the opinion and order above mentioned."

In fact, the Second Amended Complaint did have all of the vices contained in the First Amended Complaint.

We regard the failure of petitioner to comply with the rulings of Judge Reeves as bordering on a contumacious flouting of his opinion.

In response to the Complaint, Commerce Trust Company filed its several motions, all in the alternative, one of which was for a summary judgment, and one of which was a prayer that this Complaint be dismissed for failure to state a claim. To this pleading petitioner filed a countermotion which contained a recital reading as follows:

> "• • • Defendants have failed to comply with Rule 56, and the Court is without jurisdiction to consider their motions for summary judgment, as pointed out in Moore's Federal Practice, p. 2256, discussing Rule 12 (b) (6), pointing out that it is thus converted into a summary judgment motion. But it then says, 'Ten days' notice of such motion should be given in accordance with Rule 56.' Defendants did not give any notice of such motion in accordance with such rule. Consequently their motions cannot be converted into motions for summary judgment."

No notice was ever given fixing a definite date for the hearing before the court of the motion, insofar as same related to the prayer for a summary judgment.

The 8th Circuit Court of Appeals disposed of this question (Pro. 12), stating: "We are unable to see that this action which is clearly within the power of the court has resulted in any prejudice to the plaintiff." That court did not hold that any such right existed but apparently disposed of that question on the ground that if it did constitute error it was "harmless error." Much has been written in late years by the courts, textbook writers and others concerning the doctrine of "Harmless Error."

However, we think these contentions devoid of merit on other grounds. The respondent had filed with Judge Reeves four motions in the alternative. This is permissible under the Rules. After days and days of argument, the consideration of almost innumerable briefs, he concluded that he should sustain the second alternative motion which asked for the dismissal of this case because the complaint did not state facts sufficient to constitute a claim. We summarize the recitals appearing in his last opinion (87 Fed. Supp. 438) as follows: It seems clear to the Court that plaintiff has not and cannot state a cause of action (claim), and that the motions to dismiss should be sustained with prejudice. The opinion fails to state a cause of action and this obviates the necessity of further proceedings in connection with the motion for summary judgment. Judge Reeves was eminently correct in holding that, based upon the allegations of the complaint itself, accompanied by the exhibits therein expressly mentioned and referred to, petitioner did not state a cause of action. He merely decided that it would be futile to have further hearings in connection with the motion for summary judgment.

C-15.

Response to subdivision X of Petitioner's Brief, wherein she erroneously contends that Secs. 87 and 88, Revised Statutes, Mo. 1939, are void.

On account of petitioner having quoted in her Appendix only Secs. 87 and 88 of the Missouri Statutes, we have, in Item 2 of our Appendix (pp. 6 to 9), quoted the related Sections 81 to 86, inclusive, of the same Statutes, and also other pertinent Missouri Partnership Statutes relating to partnership estates. We contend that what petitioner says cannot be understood unless same be considered in the light of the other Statutes quoted in our Appendix. This unfounded contention has been presented by petitioner to

many courts. She presented the same to the Supreme Court of Missouri in the case of *Moffett* v. *Commerce Trust Company,* 354 Mo. 1098, 193 S. W. (2d) 588 (see top of page 1102). In answer to these contentions the court (on page 1130), said: "Appellants make many other assignments of error assailing the constitutionality of the Missouri Statutes relating to partnership estates," and follows that recital by the following: "Most, if not all of these questions, have been decided adversely to appellant by courts of competent jurisdiction. * * *."

There is nothing to this contention. Furthermore, Thomas S. Moffett, as shown elsewhere in this brief, made his final settlement in the Probate Court of Jackson County, Missouri, and upon exceptions being filed, same was approved as modified, and in compliance with request for instructions contained in his final settlement, and with the order of the court approving his final settlement, he conveyed all of the property to his successor, and did not even appeal from the orders of the Probate Court directing him to so convey to his successor. So, the question of whether or not he might be compelled to go to jail for contempt of the court in refusing to obey its orders never arose in this case.

C-16.

Response of respondent Commerce Trust Company to subdivision XII making the contention that your Court does not have the Constitutional right to dispose of a petition for certiorari in the manner which has obtained throughout the years.

Petitioner sought to review this case by certiorari and not by appeal. We might be content to cite the sage and apposite comment of Judge Harlan F. Stone in *Anderson National Bank* v. *Luckett,* 321 U. S. 233, 88 L. Ed. 692, where he very tersely said:

"The fact that a procedure is so old as to have become customary and well known in the community is of great weight in determining whether it conforms to due process, for 'Not lightly vacated is the verdict of quiescent years' (citing cases)."

WHEN THIS CONTENTION IS STRIPPED OF ALL OF ITS VERBIAGE AND REDUCED TO ITS ESSENCE IT MEANS THAT PETITIONER IS NOW CONTENDING THAT THROUGHOUT THE YEARS YOUR PREDECESSORS AND YOURSELVES HAVE HANDLED THE APPLICATIONS FOR CERTIORARI IN A MANNER CONTRARY TO THE PROVISIONS OF THE CONSTITUTION AND WITHOUT ANY RIGHT OR JURISDICTION SO TO DO.

The writer feels that Sections 1254, 2101 and 2106 of Title 28, U. S. C. (the new Judicial Code) (cited by petitioner) in nowise enlarge the provisions of former Codes but that in some particulars they eliminate certain provisions of the former Codes in such manner as to make them more restrictive.

Section 1254 provides for reviews of cases in the Courts of Appeals by several methods, the first one of which is stated as follows:

"Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:
(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;"

It is to be noted that in the last-quoted clause Congress used the words "by writ of certiorari" which must be construed to mean in accordance with the uniform practice that had theretofore obtained in the United States Supreme Court for many years, and this assumption is predicated upon the universal knowledge possessed by Congress and all members of bench and bar.

On page 20 of petitioner's brief she cites the case of *Durousseau* v. *United States,* 6 Cranch. 307, l. c. 313-314, 3 L. Ed. 232 (wherein an appeal was involved), and quotes an excerpt from what Mr. Justice Marshall said therein. It is notable that petitioner ends the foregoing quotation with a period, and entirely omits the next sentence in the same paragraph reading as follows: "But they are limited and regulated by the judicial act, and by such other acts as have been passed on the subject."

We think nothing more need to be said except to again refer to the recent illuminating opinion of this Court in the case of *Maryland* v. *Baltimore Radio Show,* 338 U. S. 912, 94 L. Ed. 562. The pronouncements in that case are supported by an unbroken line of cases in your Court throughout the years. We have made much research on account of this startling contention and have reached the firm conclusion that it is entirely devoid of merit. Further discussion here would unduly prolong this brief. We doubt if petitioner's counsel realizes that this contention in effect says that your illustrious predecessors and the present members of your Court, all learned and able lawyers of outstanding national reputation, have throughout the years in the handling of writs of certiorari *violated the very provisions of the Federal Constitution.* This serious charge is not to be lightly regarded but, fortunately, it does not have a semblance of merit.

Conclusion.

Doubtless in the foregoing there appear inaccuracies as to dates and clerical errors. If on review we find any of them of significance they will be brought to the attention of the Clerk of the Court by an Errata. Throughout, we have been actuated by a sincere desire to present the facts and the law clearly and fairly. We feel, and sincerely hope, that we have not failed in that regard.

We respectfully request this Court to deny the Petition of Petitioner for Certiorari.

Most respectfully submitted,

CHARLES M. BLACKMAR,
JAMES E. GOODRICH,
HUGH M. HILLER,
PHILIP J. CLOSE,
Attorneys for Respondent Commerce Trust Company.

APPENDIX.

ITEM 1.

(This item is a true copy of pages 8 to 10, inclusive, and the top incomplete paragraph and the first complete paragraph on page 11 of our printed record. The other parts of Part III follow on pages 11 to 16 of our record.)

Copy of motion of defendant (now respondent) Commerce Trust Company to dismiss the Second Amended Complaint for failure to state a claim.

(On April 2, 1948, Commerce Trust Company filed a document in the lower court captioned as hereinafter set forth, Part III of which constitutes respondent Commerce Trust Company's motion to dismiss the complaint for failure to state a claim, or claims, upon which relief can be granted. Said caption and the pertinent parts of said Part III follow.)

> Amendments To Defendant Commerce Trust Company's Consolidated Motions, Filed March 20, 1948, Entitled: "Consolidated Motions Of Separately Moving Defendant Commerce Trust Company."

Now comes defendant Commerce Trust Company, and pursuant to leave granted by this Court by its Order dated March 22, 1948 (hereby affirming, restating, realleging, adopting, and incorporating herein by reference, all of the motions, grounds and averments contained in a document entitled "Consolidated Motions of Separately Moving Defendant Commerce Trust Company" and in all of the parts thereof, including the Exhibits therein mentioned and made a part thereof, filed by it in this Court on March 20, 1948), does hereby amend said "Consolidated Motions of Separately Moving Defendant Commerce Trust Company" by adding thereto at the end thereof two new and additional parts, respectively numbered Part III and Part IV, to-wit:

Part III.

Motions To Dismiss Second Amended Complaint For Failure Thereof To State A Claim Or Claims Upon Which Relief Can Be Granted. Exhibits Containing Matters Presented By Defendant Commerce Trust Company In Support Of Said Motions To Dismiss. Adoption By Defendant Commerce Trust Company Of Exhibits Filed By Defendant Orlin A. Weede

[fol. 15] **Containing Matters Now Presented By Defendant Commerce Trust Company In Support Of Said Motions To Dismiss.**

Defendant Commerce Trust Company separately moves that said Plaintiffs' Second Amended Complaint be dismissed on the following grounds, to-wit:

(a) Because said Complaint fails to state a claim or claims against this defendant upon which relief can be granted.

(b) Because each and every paragraph of said Complaint respectively, and all of the allegations therein contained respectively, when supplemented, aided by, and considered in the light of and in connection with all of the other allegations set forth in said Second Amended Complaint, and the Exhibits thereto attached, fails to state a claim or claims against this defendant upon which relief can be granted.

(c) Because it appears upon the face of said Second Amended Complaint and the Exhibits thereto attached that plaintiffs' alleged respective claims and alleged rights of action did not accrue within five years next before the date of the commencement of this suit, and on that account each and all of them have become completely barred by the applicable Statutes of Limitation; and by reason thereof said Second Amended Complaint fails to state a claim or claims against this defendant upon which relief can be granted.

(d) Because as shown by (a) the allegations in said Second Amended Complaint and of the Exhibits thereto attached, and as shown by (b) the facts of which this Court will take judicial notice, and (c) as shown by Exhibits 1 to 27 both inclusive attached to and forming a part of defendant Weede's document hereinafter referred to entitled: "Consolidated Defenses of Defendant Orlin A. Weede" (filed in this cause on March 23, 1948) which Exhibits are herein, as hereinafter appears, adopted by defendant Commerce Trust Company, and also as shown by (d) Exhibits 1 to 12 attached hereto and hereby made a part hereof.

A.

(1) the various judgments, decrees and orders of the Probate Courts of Wyandotte, Morris and Chautauqua Counties in the State of Kansas, mentioned in said Second Amended Complaint; and (2) the various judgments, orders and decrees of the Probate Court of Jackson County, Missouri, entered prior to the death of Thomas S. Moffett and mentioned in said Second Amended Complaint, and the orders of said Probate Court concerning the Hymer Ranch mentioned in paragraph 48 of said Second Amended Complaint; and (3) the various judgments, decrees and orders entered in the District Court of Harper County, Kansas, mentioned in second Second Amended Complaint; and (4) the judgments, decrees and orders of the District Court of Comanche County, Kansas, mentioned in said Second Amended Complaint; and (5) the judgments, decrees, orders and decisions in the Supreme Court of Kansas mentioned in said Second Amended Complaint (including its decision in the case of *Clark* v. *Andrews*, 136 Kan. 23, 13 P. (2) 555); and (6) the various orders, judgments and decrees and decisions of the United States District Court for the State of Kansas and in the United States

Circuit Court of Appeals for the Tenth Circuit mentioned in said Second Amended Complaint; and (7) the various judgments, decrees and orders of the Circuit Court of Jackson County, Missouri, in the case of *Louise McGrew Moffett, et al.*, v. *Commerce Trust Company, et al.*, mentioned in said Second Amended Complaint; and (8) the judgment and decision of the Supreme Court of Missouri, 354 Mo. 1098, 193 S. W. 2d 588 (rendered on the appeal of plaintiffs from the judgment in the last named case), mentioned and referred to in said Second Amended Complaint and also the orders of said Circuit Court of Jackson County, Missouri, respectively, entered on August 23, 1943, and November 8, 1944 (which orders without designation of any dates are respectively referred to in the Second Amended Complaint), respectively overruling the two separate and distinct Separate Motions of Louise McGrew Moffett, Executrix of the estate of Thomas S. Moffett, deceased, to dismiss said cause No. 339134 mentioned in said Complaint, and each and all of the foregoing have become final, and on account thereof same and each of the same are not subject to collateral attack in the instant action; and

B.

the matters and things complained of and alleged and asserted and the issue presented by plaintiffs in said Second Amended Complaint have been decided adversely to the plaintiffs by final judgments, decrees and orders of courts of competent jurisdiction in suits brought by plaintiffs or in which they actively participated as defendants, or in actions and proceedings in which persons standing in privity with the plaintiffs were parties, and on that account have become and now stand as *res judicata*, against the plaintiff in both her individual and in her representative capacities, and said plaintiff is now estopped to con-

tend otherwise in either of said capacities and because plaintiffs, respectively, under the law, cannot in this action make collateral attacks upon said final judgments, decrees and orders or any of them.

By reason of each and all of the foregoing said Second Amended Complaint fails to state a claim or claims against this defendant upon which relief can be granted.

ITEM 2.

Certain Missouri Partnership Administration Statutes.

Petitioner's petition for writ is followed by an Appendix, on page 32 of which are set forth Sections 87 and 88, R. S. Mo., 1939. As these sections constitute only a part of the pertinent statutes we are here setting forth the immediately prior relevant sections relating to the administration of partnership estates, as they appear in R. S. Mo., 1939:

"Sec. 81. *Surviving partner may give bond and administer.*—In case of the death of a member of a copartnership, the surviving partner or partners, resident in this state, shall administer the effects and estate of the copartnership in the county in which the copartnership business was conducted, on giving bond as hereinafter provided. (R. S., 1929, 81.)" (1919, Sec. 80; now R. S. Mo., 1949, Sec. 461.650.)

"Sec. 82. *Failing to do so, the individual administrator shall take charge of entire effects.*—If the surviving partner shall not have administered on the partnership estate at the time the executor or administrator of the estate of the deceased partner shall proceed to take his inventory, it shall be the duty of such executor or administrator to return to the court an inventory of the whole of the partnership estate, goods and chattels, rights and credits, ap-

praised at their true value, as in other cases: *But provided, however,* the administrator shall keep said partnership estate separate and distinct, and shall account and report in all respects for same as a separate estate. (R. S., 1929, 82.)" (1919, Sec. 81; now R. S. Mo., 1949, Sec. 461.660.)

"Sec. 83. *Otherwise only proportional part to be inventoried by individual representatives.* If the surviving partner shall have inventoried and caused to be appraised the partnership estate, the executor or administrator of the deceased partner shall include in the inventory which he is required by law to return to the court the gross amount of the partnership estate, as inventoried and appraised; but the executor or administrator shall be charged with an amount equal only to the proportional part of the deceased in the partnership interest. (R. S., 1929, 83.)" (1919, Sec. 82; now R. S. Mo., 1949, 461.670.)

"Sec. 84. *Bond of surviving partner.*—The surviving partner of partners desiring to administer the copartnership estate shall give bond in such sum as the court may determine, at least double the value of the interest of the deceased partner in the copartnership assets, and with such securities as is required in other cases of administration, conditioned as follows:

> The condition of the above bond is, that if ....., surviving partner of the late firm of ....., shall use due diligence and fidelity in closing the affairs of the late copartnership, apply the property thereof in payment of legal allowances, the expenses of administration, the partnership debts, and in general to do and perform all other acts and things which are or may hereafter be required of him by law, render an account, annually, upon oath, to the court, of all the partnership affairs, including the property owned by the late firm, and the debts, due thereto, as well as what may have been paid by the survivor toward the

partnership debts, and what may still be due and owing therefor, and pay over, within two years, unless a longer time be allowed by the court, to the executor or administrator, the excess, if any there be, beyond satisfying the partnership debts and costs and expenses in closing the affairs of the copartnership, then the above bond to be void; otherwise to remain in full force. (R. S., 1929, 84.)" (1919, Sec. 83; now R. S. Mo., 1949, 461.680.)

"Sec. 85. *When and how executed.*—Any bond required by this article may be executed by the surviving partner in the county in which he resides, and may there be acknowledged before and approved by the probate court, or the judge or clerk thereof in vacation, and shall be certified to the probate court in the county in which administration had been granted on the estate of the deceased partner, subject to the approval or rejection of the court at the next regular or adjourned term thereof, entered of record. (R. S., 1929, 85.)" (1919, Sec. 84; now R. S. Mo., 461.690.)

"Sec. 86. *If such bond is not executed, executor, etc., of deceased partner to give bond, etc.*—In case the surviving partner or partners shall neglect or refuse to give the bond required by this article, within thirty days after the granting of letters testamentary or of administration on the estate of the deceased partner, the executor or administrator of the deceased partner shall give bond, in addition to the bond given by him as executor or administrator, in a sum at least double the value of the whole copartnership estate, secured as bonds in other cases of administration, and conditioned that he will faithfully execute the trust and with no unnecessary waste or expense, which bond may be enforced like other administration bonds. (R. S., 1929, 86.)" (1919, Sec. 85; now R. S. Mo., 1949, 461.700.)

Other pertinent Missouri partnership statutes copied from R. S. Mo., 1939:

"Sec. 91. *Rights of surviving partner and creditors when representative of deceased partner administers.*—Surviving partners and creditors of a partnership taken charge of by the executor or administrator of the deceased partner, as herein provided, may appear in court and defend against the recovery of any claim presented against such partnership, against the partnership effects, and may appeal from the judgment of the court, upon making affidavit and giving bond, as required for appeals in other cases from such court. (R. S., 1929, 91.)" (1919, Sec. 90; now R. S. Mo., 1949, 461.760.)

"Sec. 92. *Laws governing ordinary cases made applicable.*—The administration upon partnership effects, whether by the surviving partner or executor or administrator of the deceased partner, shall in all respects conform to administrations in ordinary cases, except as otherwise herein provided; and the person administering upon partnership effects, and his securities on his official bond, shall perform the same functions and duties, be governed by the same limitations, restrictions and provisions, be subject to the same penalties, liabilities and actions, as other administrators and their sureties. (R. S., 1929, 92.)" (1919, Sec. 91; now R. S. Mo., 1949, 461.770.)

Another pertinent Missouri Statute:

"Sec. 202. *Administrators as creditors—proceedings.*—Any executor or administrator may establish a demand against his testator or intestate by proceeding against his co-executor or co-administrator in the manner prescribed for other persons; but if there be no co-executor or co-administrator, he shall file his claim and other papers,

and the court shall appoint some suitable person to appear and manage the defense. (R. S., 1929, 203.)" (1919, Sec. 202; now R. S. Mo., 464.230.)

ITEM 3.

The following section appears in Article 3 of R. S. Mo., 1939 (the article relating to Trust Companies), to-wit:

"Sec. 8029. *Restrictions on power to accept or execute trusts.*—When any corporation shall have been named as executor in any will hereafter executed, and shall have qualified as such the presumption shall be that such will was not prepared by a salaried employee of said corporation; but upon the application of any heir, devisee or legatee, made in the probate court of the county for the removal of such executor said presumption may be rebutted by evidence satisfactory to the court hearing such application, unless said will or some codicil or certificate attached thereto shall contain a recital that at or before the execution of said will, the testator had advice or counsel in relation thereto from someone not under salary from said corporation. In the absence of such recital, the court may on such application and upon satisfactory evidence that said will was prepared by a salaried employee of said corporation, revoke the appointment of, and remove such corporation as such executor. (R. S., 1929, 5426.)" (1919, Sec. 11804; now R. S. Mo., 1949, 363.230.)

ITEM 4.

References to provisions of the Statutes of the State of Oklahoma relating to partnerships.

Section 54 of Title 54, Oklahoma Statutes, 1941, reads in part as follows:

> "• • • On the death of a partner, the surviving partners succeed to all of the partnership property, whether real or personal, in trust for the purpose of liquidation, even though the deceased was appointed by agreement sole liquidator; and the interest of the deceased in the ultimate distribution of the partnership assets passes to those who succeed to his other personal property. R. L., 1910, 4468."

Section 255 of Title 58 of Oklahoma Statutes, 1941, reads in part as follows:

> "• • • The surviving partner shall settle the affairs of the partnership without delay, and account with the executor or administrator and pay over such balances as may from time to time be payable to such executor or administrator in the right of the decedent. R. L., 1910, Sec. 6305."

In

Leona Rockett Bennett, as an Individual and Executrix of the Estate of Thomas A. Moffett, Deceased,

Petitioner,

vs.

Oklahoma Tower Corporation, a Corporation, Hugh Wood, Grace A. Wood, B. O. Bowers, William H. Kurz and E. E. Cornish,

Respondents.

CORRECTION (ERRATA) TO:

BRIEF OF RESPONDENT COMMERCE TRUST COMPANY IN OPPOSITION TO DOCUMENTS FILED BY PETITIONER, ENTITLED

(a) "Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit"

(b) "Petitioner's Brief in Support of Petition for Certiorari"

Charles M. Blackmer,
James E. Gorham,
Hugh M. Hicks,
Peter J. Glass,
Attorneys for Respondent Commerce Trust Company,
Address of Attorneys:
Commerce Building,
Kansas City, Missouri.

In the Supreme Court of the United States

No. 762.
October Term, 1950.

(Now No. 75,
October Term, 1951.)

LOUISE McGREW MOFFETT as an Individual and Executrix of the Estate of Thomas S. Moffett, Deceased,
Petitioner,

vs.

COMMERCE TRUST COMPANY, a Corporation, HELEN WEEDE, ORLIN A. WEEDE, B. C. HOWARD, WILLIAM H. KOPP AND R. E. COPMAN, *Respondents.*

ERRATUM (ERRATA) TO:

BRIEF OF RESPONDENT COMMERCE TRUST COMPANY IN OPPOSITION TO DOCUMENTS FILED BY PETITIONER, ENTITLED

(a) "Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit."

(b) "Petitioner's Brief in Support of Petition for Certiorari."

This ERRATUM is submitted to correct the following errors as to dates, clerical errors and the like:

(a) Index, P. 3, Point 7, 10th line: change words "this Court" to the Court of Appeals.

(b) Index, P. 3, Point 10, 1st and 3rd lines: change word "this" to the 8th.

(c) Page 5, 11th line: change word "July" to August.

(d) Page 5, 15th line: change figures "1929" to 1930.

(e) Page 9, 2nd line from bottom: change figures "1945" to 1949.

(f) Page 13, 11th line: change word "redressable" to redressible.

(f-a) Page 16, 11th line: change the word "June" to July.

(g) Page 19, indented paragraphs: this is *repetition;* these paragraphs are identical.

(h) Page 19, 4th line from bottom: change word "contents" to context.

(i) Page 29, 6th line from bottom of indented paragraph: change figures "126" to 136.

(j) Page 38, (C-4): change words "Judge Van Deventer" in two places to Justice Van Devanter.

(k) Page 42 (C-7) in 3rd line from bottom of quoted part: add the word not after the word "is."

(l) Page 45, Point 7: make same change as indicated on Page 3 of Index.

(m) Page 46, Point 10: make same changes as indicated on Page 3 of Index.

(n) Page 66, 3rd line: change figures "407" to 707.

(o) Page 66, 5th line: change figures "669" to 699 and add after 699 (75 Pac. 1001).

(p) Page 70, 20th line: change figures "150" to 170.

(q) Page 70, 2nd line in incomplete paragraph at end: change word "our" to her.

(r) Page 71, 7th line from bottom: change word "this" to the.

(s) Page 72 (C-14), 6th line following caption: change "March 8" to February 7.

(t) Page 73, following the indented quotation insert: (R225-226).

(u) Page 74, 13th line: change word "opinion" to complaint.

(v) Page 75, 3rd line from bottom: change word "Judge" before Harlan F. Stone to Justice.

(w) Page 77, 1st line: change figure "20" to 58.

Respectfully submitted,

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